

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

CHICHESTER EDUCATION ASSOCIATION, :  
PSEA/NEA :  
 :  
v. : Case No. PERA-C-21-279-E  
 :  
CHICHESTER SCHOOL DISTRICT :

**FINAL ORDER**

On December 20, 2021, the Chichester Education Association, PSEA/NEA (Association) filed a Charge of Unfair Practices with the Pennsylvania Labor Relations Board (Board), alleging that Chichester School District (District) violated Section 1201(a)(5) of the Public Employee Relations Act (PERA) by unilaterally transferring the work of the In-School Suspension Coordinator (ISS Coordinator) to a school principal. On March 9, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held before a Hearing Examiner. The hearing was held on May 18, 2022, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. Both parties filed post-hearing briefs.

On September 1, 2022, the Hearing Examiner issued a Proposed Decision and Order (September 1, 2022 PDO), concluding that the District committed an unfair practice under Section 1201(a)(5) of PERA by designating the position of Administrator for Restorative Practices as an administrative, non-bargaining unit position without first filing a petition for unit clarification with the Board and assigning the work of the ISS Coordinator to that position. Thereafter, the District filed exceptions and a supporting brief with the Board on September 20, 2022, challenging the Hearing Examiner's September 1, 2022 PDO. On February 21, 2023, the Board issued an Order Directing Remand to the Hearing Examiner for Further Proceedings sustaining the District's exceptions in part,<sup>1</sup> and remanding the matter to the Hearing Examiner for a determination of whether the Association established that the District unilaterally transferred the work of the ISS Coordinator to the Administrator for Restorative Practices.

Based upon the evidence presented at the May 18, 2022 hearing, the Hearing Examiner issued a second Proposed Decision and Order on March 14, 2023 (March 14, 2023 PDO), concluding that the District violated Section 1201(a)(5) of PERA by unilaterally diverting the duties of the ISS Coordinator to the Administrator for Restorative Practices held by Michael Stankavage. In that respect, the Hearing Examiner stated, in relevant part, as follows:

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<sup>1</sup> Specifically, the Board found that the Association's Charge of Unfair Practices was limited to an allegation that the District unilaterally transferred the work of the ISS Coordinator to a non-bargaining unit administrator. Therefore, the Board held that the Hearing Examiner was without jurisdiction to entertain or conclude that the District committed an unfair practice by designating the Administrator for Restorative Practices as an administrative, non-bargaining unit position.

I conclude that ... the Union met its burden of proving, with substantial, competent evidence, that the District unilaterally transferred the work of the ISS Coordinator to Mr. Stankavage in his role as the Administrator of Restorative Practices, even though Mr. Stankavage plans to perform additional duties not previously performed by Mr. Shivone. Dr. Nerelli wrote to President Dunn: "Mr. Stankavage is engaging as an administrator in restorative practices and not merely coordinating ISS in a single building." (F.F. 22) (emphasis added). The clear meaning of Dr. Nerelli's communication to President Dunn is that Mr. Stankavage is indeed performing some, if not all, [ISS Coordinator] duties formerly performed by Mr. Shivone even though not "merely" Middle School [ISS Coordinator] duties. The record shows that the District did not replace Mr. Shivone with a bargaining unit member to perform the work of the [ISS Coordinator] in the Middle School. The failure to replace the [ISS Coordinator] at the Middle School with a bargaining unit member in addition to Dr. Nerelli's statement indicating that Mr. Stankavage is doing at least some, if not all, the duties that Mr. Shivone formerly performed, is direct evidence that Mr. Stankavage is doing the bargaining unit work of the Middle School [ISS Coordinator]. It is not relevant to the legal determination at issue in this case whether Mr. Stankavage performs, or plans to perform, administrative duties above and beyond those formerly performed by Mr. Shivone.

(March 14, 2023 PDO at 3) (emphasis in original).

On April 3, 2023, the District filed timely exceptions with the Board challenging the Hearing Examiner's finding of an unfair practice in the March 14, 2023 PDO.<sup>2</sup> On April 6, 2023, the Association filed a response and brief in opposition to the exceptions. The findings relevant to the exceptions are as follows.

Prior to June 2019, In-School suspension at the Middle School was proctored by a Middle School building substitute or a teacher during their duty period. In 2019, Justin Shivone, a bargaining unit 7<sup>th</sup> grade social studies teacher, developed a detailed proposal for the In-School Suspension (ISS) program at the District's Middle School. (FF 4). Mr. Shivone developed the ISS program in order for suspended students to receive educational services at the Middle School instead of staying home. (FF 8).

Based on Mr. Shivone's proposal, the District created the position of ISS Coordinator. On June 19, 2019, the District posted the position of ISS Coordinator for the 2019-2020 school year. Thereafter, the school board awarded the ISS Coordinator position to Mr. Shivone at its September 10, 2019 meeting. (FF 4). As the ISS Coordinator, Mr. Shivone was compensated under the parties' collective bargaining agreement (CBA), he had access to the grievance procedure and his terms of employment were governed by the CBA.<sup>3</sup>

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<sup>2</sup> The District incorporated by reference its exceptions and brief in support to the September 1, 2022 PDO.

<sup>3</sup> The bargaining unit of professional employees represented by the Association is a grandfathered unit pursuant to Section 602 of PERA. The parties' CBA recognizes all full-time and regular part-time professional employees

(FF 5). He held the ISS Coordinator position until June 22, 2021, at which time the District promoted Mr. Shivone to the administrative position of Dean of Students. (FF 4, FF 9).

There is no evidence that Mr. Shivone's ISS proposal, which contains a list of job duties for the ISS Coordinator position, was officially adopted by the school board and the parties agreed that the ISS proposal is not a job description for the ISS Coordinator. Some of the job duties contained in the proposal were not corroborated by a witness with first-hand knowledge. However, Nancy Dunn, Association President and Middle School Spanish teacher, stated that she observed Mr. Shivone providing character education and mentoring online during the pandemic, that the character education was his lesson plan, and that he provided supervision for students to work on teacher provided work assignments. Dr. Daniel Nerelli, the District Superintendent, confirmed that Mr. Shivone provided character education as the ISS Coordinator. (FF 6). Mr. Shivone also ensured that students completed teacher provided assignments, answered questions from the students about their assigned work, and reflected with the students about the reasons for their in-school suspension. (FF 8).<sup>4</sup>

On June 3, 2021, the District posted the vacancy for the ISS Coordinator for the 2021-2022 school year.<sup>5</sup> (FF 9). Steve Chase, a Middle School teacher, applied for the vacant ISS Coordinator position. After interviewing for the position, Mr. Chase received a phone call from the Human Resources Director who indicated that he was chosen for the position subject to school board approval. (FF 11).

On August 18, 2021, Dr. Gregory Puckett, an Assistant Superintendent, emailed staff a letter from Dr. Nerelli informing the staff that Mr. Stankavage, an administrator, would be transitioning to a new role as the Administrator for Restorative Practices and would be overseeing the In-School Suspension Program at the Middle School, beginning August 24, 2021. (FF 13,

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including "kindergarten teachers, elementary classroom teachers, secondary classroom teachers, elementary special education classroom teachers, secondary special education teachers, reading teachers, librarians, elementary music, art and physical education teachers, certified nurses, elementary and secondary guidance counselors, other teachers involved in direct classroom instruction, school psychologists, and social worker and/or home and school visitor". (FF 25).

<sup>4</sup> In-School suspension at the High School operates differently than the Middle School. At the High School, the bargaining unit members have a duty period where they can be assigned to cover In-School suspension in order for the students to have a teaching professional present. A different teacher rotates into the In-School suspension room at the High School at the change of periods throughout the day. (FF 12).

<sup>5</sup> The email attaching the posting for the ISS Coordinator position also included a notification of vacancies for the positions of supply clerk, family and consumer science, autistic support teacher, and class B maintenance. The email was sent to Association members and individuals who could be interested in the other listed positions. It is not clear on the face of the email whether administrators received the email. However, the attached posting is addressed to "All Staff." (FF 10).

FF 14). On September 15, 2021, Ms. Dunn emailed Dr. Nerelli concerning the assignment of the duties of the ISS Coordinator to Mr. Stankavage, stating, in relevant part, as follows:

As we have previously discussed, the Association has not agreed to the permanent or long-term loss of the ISS Coordinator position at Chichester Middle School. Given the circumstances involved with Mr. Stankavage's transfer to the Middle School in the capacity of an administrator on special assignment, the Association is willing to discuss the temporary loss of the bargaining unit position if the following conditions are agreed to, in a MOU, signed by both parties.

The terms are as follows:

Mr. Stankavage may remain in the position for the remainder of the 2021-2022 school year. After the 2021-2022 school year, the position reverts back to the bargaining unit.

(FF 19).

On September 21, 2021, the school board approved the job description for the position of Administrator for Restorative Practices as a 12-month position. (FF 20). The job description for the Administrator for Restorative Practices provides that one of the essential duties and responsibilities of the position is to "[s]upervise and effectively run the Middle School In-School Suspension (ISS) Program". Dr. Nerelli testified that these duties were performed by Mr. Stankavage in his role as the Administrator for Restorative Practices. (FF 20).

On October 1, 2021, Dr. Nerelli responded to Ms. Dunn's September 15, 2021 email, stating, in relevant part, as follows:

We have reviewed your position regarding the Middle School ISS position internally, and with legal counsel. Please let me point out that the position that Mr. Stankavage is presently occupying is not the same position as the Middle School ISS Coordinator position. First it is a district wide position across all grades and schools. Second, Mr. Stankavage is engaging as an administrator in restorative practices and not merely coordinating ISS in a single building. Third, while a specific Middle School ISS bargaining unit position is not currently being utilized, we have added a lead teacher at Hilltop and two new cyber academy positions without reducing any teachers. ... Therefore, we don't feel the type of MOU you are proposing is necessary or appropriate, and respectfully decline your request.

(FF 21). The ISS Coordinator position has not been abolished, but no one currently occupies that position. (FF 20). The Association and the District did not reach an agreement regarding the assignment of the ISS Coordinator duties to Mr. Stankavage as the Administrator for Restorative Practices. (FF 16).

In its exceptions, the District initially alleges that the Hearing Examiner erred in concluding that it violated Section 1201(a)(5) of PERA because the ISS Coordinator is not a bargaining unit position. Specifically, the District asserts that the duties of the ISS Coordinator position are

administrative in nature and that the position was posted and distributed to all professional<sup>6</sup> employees, including non-bargaining unit administrators. However, the record shows that the District treated the ISS Coordinator position as a bargaining unit position. Indeed, Mr. Shivone was compensated under the parties' CBA, had access to the grievance procedure and his terms and conditions of employment were governed by the CBA while in the ISS Coordinator position. (FF 5, Joint Exhibit 12). Further, Dr. Nerelli acknowledged in his October 1, 2021 email and at the hearing in this matter that the position is a bargaining unit position. (N.T. 87, FF 21, Joint Exhibit 7). Therefore, the ISS Coordinator position is part of the professional bargaining unit represented by the Association. See Allegheny Valley Education Association PSEA/NEA v. Allegheny Valley School District, PERA-C-11-222-W (Order Directing Remand to Hearing Examiner for Further Proceedings, March 19, 2013) (where parties treat position as included in the bargaining unit, employer may not subcontract work of position without bargaining); see also Penns Valley Education Association v. Penns Valley School District, 53 PPER 40 (Proposed Decision and Order, 2021) (same).

The District's exceptions further challenge the Hearing Examiner's factual findings and assert that they are not supported by substantial evidence of record. In particular, the District alleges that the Hearing Examiner erred in finding that the ISS Coordinator position was posted for a bargaining unit member (FF 4) and that it was unclear whether the June 3, 2021 email attaching the posting of the ISS Coordinator position was sent to administrators (FF 10). It is well-settled that the Hearing Examiner's function is to resolve conflicts in evidence, make findings of fact from conflicting evidence, and draw inferences from those findings of fact. PLRB v. Kaufmann Department Stores, Inc., 29 A.2d 90 (Pa. 1942). Absent the most compelling of circumstances, the Board defers to the credibility determinations of its hearing examiners who observe the manner and demeanor of the witnesses during the testimony. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Id.; International Association of Firefighters Local 840 v. Larksville Borough, 48 PPER 82 (Final Order, 2017). The District has failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations with regard to the posting of the ISS Coordinator position.

Further, the Hearing Examiner's decision will be upheld if the factual findings are supported by substantial and legally credible evidence, and the legal conclusions drawn from those facts are reasonable, and not capricious, arbitrary or illegal. Abington Transportation Association v. PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a

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<sup>6</sup> To support its assertion that the ISS Coordinator position is not part of the professional bargaining unit, the District argues that the definition of professional employee under the Public School Code, which includes administrators such as principals, should be applied in this matter. This argument is without merit as the Courts have held that the definition of "professional employee" under Section 301(7) of PERA should be applied to cases before the Board. School District of the City of Erie v. PLRB, 832 A.2d 562 (Pa. Cmwlth. 2003) (definition found in one statute is not controlling where another statute provides its own definition of the same term).

reasonable mind might accept as adequate to support a conclusion. Lycoming County v. PLRB, 943 A.2d 333 (Pa. Cmwlth. 2007). The Board finds that the Hearing Examiner's findings concerning the posting of the ISS Coordinator position (FF 4, 10) are supported by the record and that the District's alleged intent to send the posting to administrators is not relevant or necessary given the fact that the District treated the position as part of the bargaining unit.

The District next asserts that the Hearing Examiner erred in finding that the work of the ISS Coordinator was exclusively performed by the bargaining unit because prior to the creation of that position, the professional bargaining unit teachers along with administrators were assigned ISS duties. The Board has held that a public employer commits an unfair practice when it transfers any bargaining unit work outside the unit without first bargaining with the employee representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). An employee 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 employees and non-bargaining unit employees 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)).

The District relies on the ISS Proposal to show that ISS duties were performed by administrators and teachers prior to the creation of the ISS Coordinator position to support its claim that those duties were not exclusive to the professional bargaining unit. However, the credited testimony of record shows that In-School suspension at the Middle School was proctored by a bargaining unit building substitute or teacher during their duty period prior to Mr. Shivone becoming the ISS Coordinator in 2019, and no testimony was presented to support that administrators performed ISS duties at the Middle School. (FF 4, N.T. 16-17). Even if administrators performed ISS duties prior to 2019, those duties became exclusive to the professional bargaining unit when Mr. Shivone became the ISS Coordinator and solely performed ISS duties in the Middle School from September 2019 until June 2022.<sup>7</sup>

The District additionally alleges that the ISS duties performed by Mr. Shivone were merely supplemental duties and, therefore, cannot be considered bargaining unit work, citing to Harbor Creek School District v.

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<sup>7</sup> The District cites to AFSCME, Council 13, AFL-CIO v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992) to support its assertion that the Association failed to show that the ISS duties were exclusively performed by bargaining unit members. In that case, the Commonwealth permitted individual counties to perform inspection services that its employees 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 the ISS program in the Middle School and the ISS duties were exclusively performed by bargaining unit members. Therefore, the decision in AFSCME, Council 13, AFL-CIO is inapplicable to the instant matter.

PLRB, 631 A.2d 1069 (Pa. Cmwlth. 1993). The District's reliance in Harbor Creek is misplaced as the facts here are readily distinguishable. In Harbor Creek, the Commonwealth Court determined that, although the position of athletic director was held by a bargaining unit teacher, the duties of the athletic director did not constitute bargaining unit work of the professional employes and was not covered by the parties collective bargaining agreement. Unlike in Harbor Creek, the duties of Mr. Shivone as the ISS Coordinator included duties of the professional employes such as character education, mentoring of students, and answering questions from the students about their assigned work. Further, the District treated the ISS Coordinator position as part of the professional bargaining unit by applying the terms of the parties' CBA to Mr. Shivone while he was in that position. As such, the Hearing Examiner properly found that the work of the ISS Coordinator was exclusively performed by the Association's bargaining unit members.

The District further asserts that it has the managerial authority to create the position of Administrator for Restorative Practices and to expand the ISS program. In particular, the District asserts that the Board must balance the interests of the District in expanding its ISS program to provide equity and restorative practices through the creation of the Administrator for Restorative Practices position with the interests of the Association.

Initially, the District misperceives the Association's interest in this matter as limited to Mr. Chase not being awarded the ISS Coordinator position. However, the Association's dispute in this case is not over the creation of the Administrator for Restorative Practices position, but in retaining the work of the ISS Coordinator in the bargaining unit. With that in mind, the Board and Courts have held that under the balancing test in PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975), the interest of the bargaining unit members in retaining their work outweighs the employer's interest in using a contractor or other non-bargaining unit persons to perform the work. PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978) (district violated duty to bargain by replacing teacher aides with unpaid volunteers); Commonwealth of Pennsylvania (Ebensburg Center) v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990), appeal denied, 592 A.2d 46 (Pa. 1991) (subcontracting laundry services violates duty to bargain); Midland Borough School District v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989), appeal denied, 581 A.2d 576 (Pa. 1990) (transfer of middle and high school students to neighboring school district violated duty to bargain); Commonwealth of Pennsylvania (Polk Center) v. PLRB, 557 A.2d 1112 (Pa. Cmwlth. 1989), appeal denied, 575 A.2d 117 (Pa. 1990) (transfer of work to non-bargaining unit employes and managers violated duty to bargain). The District has not presented any evidence warranting departure from this established precedent.

Here, the record shows that the District created the Administrator for Restorative Practices position and assigned this position the duties of supervising, overseeing and running the ISS Program at the Middle School. The record also establishes that the ISS Coordinator position has not been abolished, but no one currently occupies that position despite that in-school suspension continues at the Middle School. As such, the Hearing Examiner properly inferred that Mr. Stankavage in his role as the Administrator for Restorative Practices was performing the duties of the ISS Coordinator.<sup>8</sup>

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<sup>8</sup> The Hearing Examiner found that the work of the ISS Coordinator at issue was limited to character education, mentoring, providing supervision for and ensuring that students work on teacher provided work assignments, answering

Although the District has the managerial authority to create administrative positions, such as the Administrator for Restorative Practices, it cannot assign bargaining unit work to those positions without first bargaining with the Association. See Allentown Education Association, PSEA/NEA v. Allentown City School District, PERA-C-14-408-E, PERA-C-14-409-E, PERA-C-14-421-E (Final Order, May 15, 2017) (District violated duty to bargain when it unilaterally assigned bargaining unit work to newly created administrative positions). In this matter, the District and Association did not reach an agreement regarding the assignment of the ISS Coordinator duties to Mr. Stankavage. Accordingly, the Hearing Examiner properly concluded that the District violated Section 1201(a) (5) of PERA.

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) (5) of PERA by assigning the duties of the ISS Coordinator to the Administrator for Restorative Practices without bargaining with the Association. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order 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 Chichester School District are hereby dismissed, and the March 14, 2023 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, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this nineteenth day of December, 2023. 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.

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questions from the students about their assigned work, and reflecting with the students about the reasons for their in-school suspension. The remedy issued by the Hearing Examiner is limited to assigning these duties back to the bargaining unit.

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

CHICHESTER EDUCATION ASSOCIATION, :  
PSEA/NEA :  
v. : Case No. PERA-C-21-279-E  
CHICHESTER SCHOOL DISTRICT :

**AFFIDAVIT OF COMPLIANCE**

Chichester School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (5) of the Public Employee Relations Act; that it has returned the bargaining unit work of proctoring, monitoring, supervising, and character education of students in the Middle School In-School Suspension program to the professional bargaining unit; that it has restored the *status quo ante* and made whole any bargaining unit employes who may have been adversely affected by the District's unfair practices; 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.

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Signature of Notary Public