

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EAST STROUDSBURG AREA EDUCATIONAL :
SUPPORT PERSONNEL ASSOCIATION :
 :
v. : Case No. PERA-C-22-134-E
 :
EAST STROUDSBURG AREA SCHOOL :
DISTRICT :

FINAL ORDER

The East Stroudsburg Area School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 18, 2023, challenging a Proposed Decision and Order (PDO) issued on March 29, 2023. In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) when it unilaterally created the position of Administrative Assistant and designated the position as a non-bargaining unit confidential position, and assigned duties previously performed by bargaining unit employees to that position. Following an extension of time granted by the Board Secretary, the District filed a brief in support of the exceptions on May 22, 2023. The Union filed a brief in opposition to the exceptions on June 9, 2023.

The facts of this case are summarized as follows. The District and the East Stroudsburg Area Educational Support Personnel Association (Union) are parties to a collective bargaining agreement (CBA), effective July 1, 2017, to June 30, 2022. (FF 4). The CBA governs the pay and working conditions for District employees classified as Business Office Personnel I (BOP I) and Business Office Personnel II (BOP II), which includes positions such as payroll clerks, tax collectors and accounts payable bookkeepers. (FF 5). Prior to January 24, 2022, Rebecca Lopez was employed as a Registration Secretary with the District and was a member of the bargaining unit. Ms. Lopez was paid as a BOP I at the contractual rate of \$18.92 per hour. Prior to taking on the Registration Secretary role in 2020, Ms. Lopez was a facilities secretary in the bargaining unit for six or seven years. (FF 6).

At a District School Board meeting held on January 24, 2022, the Board appointed Ms. Lopez to the newly created non-bargaining unit position of Administrative Assistant at the rate of \$21.00 per hour. (FF 7, 8). The District did not bargain with the Union over Ms. Lopez' pay increase or the creation of an Administrative Assistant position outside the bargaining unit. (FF 9). Further, the District did not file a unit clarification petition with the Board to remove the new Administrative Assistant position from the bargaining unit. (FF 10).

Eric Foresyth, the Director of Communications and Operations who oversees the operational aspects of the District and is the direct supervisor of Ms. Lopez in her new position as Administrative Assistant, testified at the hearing that as an Administrative Assistant, Ms. Lopez is responsible for ordering items that his office needs and processing requisitions or payment that come to him from a subordinate director or supervisor who does not have support staff available for assistance with that task. (FF 15, 16, 22). Thus, since January 24, 2022, when the District unilaterally deemed Ms.

Lopez's Administrative Assistant position as "confidential" under PERA, Ms. Lopez continued working in the District's Administrative Services building handling requisition forms and purchase orders, which are documents used to purchase goods or services on the District's behalf, as she had done as a bargaining unit employee. (FF 11).

John Rosado serves as Treasurer of the Union and a member of its bargaining team, and has worked for the District for 17 years, including eight or nine years at the Business Office in the Administrative Services building as an accounts payable employee. During the hearing, Mr. Rosado testified that Ms. Lopez handled purchase orders as part of her previous duties as Facilities Secretary in the bargaining unit. (FF 12). Mr. Rosado acknowledged that administrative assistants classified as confidential employees also handle requisitions and purchase orders but only in offices where there are no bargaining unit support staff employees. Mr. Rosado testified that Jessie Lohman, a bargaining unit employee in the business office, who used to handle requisitions and purchase orders but no longer performs those duties, also works in the Administrative Services business office. (FF 14).

The Union filed a Charge of Unfair Practices with the Board on May 17, 2022, alleging that the District violated Section 1201(a)(1) and (5) of PERA, by unilaterally designating Ms. Lopez's Administrative Assistant position as a confidential position outside the bargaining unit, providing her with pay and benefits different from those found in the parties' CBA, and having Ms. Lopez, as the Administrative Assistant, perform duties she had done previously as a bargaining unit employee. On June 10, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing and assigned this matter to a Hearing Examiner. After a continuance, the hearing was held before the Hearing Examiner on October 26, 2022, 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 first concluded that the Union sustained its burden of proving that the District violated PERA by unilaterally removing the bargaining unit work of processing requisition and purchase orders. The Hearing Examiner also found that the District violated the Act by unilaterally designating the new Administrative Assistant position as "confidential" without bargaining the removal of work or filing a unit clarification petition with the Board.¹ As a remedy, the Hearing Examiner directed the District to return the requisition and purchase order duties and the Administrative Assistant position to the unit and provide Ms. Lopez, on a prospective basis, with pay and benefits per the provisions of the parties' CBA.

¹ The Hearing Examiner additionally concluded that the Board was without jurisdiction to address assertions made in the Union's post-hearing brief regarding the removal of various Information Technology duties from the bargaining unit with the transfer of Ms. Lopez from the position of Registration Secretary to that of Administrative Assistant because those claims were not raised in the Charge filed with the Board. No exceptions were filed concerning the Hearing Examiner's decision on this issue. 34 Pa. Code § 95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

On exceptions, the District first argues that the Hearing Examiner erred in finding that the District diverted bargaining unit work by permitting Ms. Lopez to continue to handle requisition forms and purchase orders in her new post as Administrative Assistant.² Well-established case law provides that where work is not exclusive to the unit, the Board will find an employer commits a violation of Section 1201(a)(1) and (5) of PERA if there is a change in the extent to which, or manner in which, members and non-members of the unit perform the work. Wyoming Valley West Educational Support Personnel Association v. Wyoming Valley West School District, 32 PPER ¶ 32008 (Final Order, 2000). Where bargaining unit and non-unit employees have both performed similar duties, a union can satisfy its burden of proving a removal of bargaining unit work by proving that the bargaining unit members exclusively performed an identifiable quantum of the shared duties or performed said duties in a particular manner under certain conditions, such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. Lake Lehman Educational Support Personnel Association v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006).

In addressing the Charge, the Hearing Examiner specifically credited John Rosado's testimony that non-bargaining unit employees only handle requisitions and purchase orders in offices where there are no bargaining unit members to perform those duties. Here, the record clearly established that there were other bargaining unit support personnel in the Administrative Services office who could perform the bargaining unit work of processing requisition forms and purchase orders. As such, the Union demonstrated that the bargaining unit retained an interest in performing the requisition and purchase order duties in the Administrative Services office. Under such circumstances the requisition and purchase orders remained bargaining unit work in the Administrative Services office, and thus could not be unilaterally assigned to Ms. Lopez as a confidential employee outside the bargaining unit. The Hearing Examiner did not err by concluding that where the District unilaterally designated the new Administrative Assistant position as a confidential non-bargaining unit position, the District violated PERA by allowing Ms. Lopez to perform requisition and purchase orders as a "confidential" Administrative Assistant in the Administrative Services office.

Next, the District asserts that the Hearing Examiner erred by concluding that the District violated PERA when it designated the new Administrative Assistant position to be outside the bargaining unit without filing a unit clarification petition. It is well-settled that "where an employer creates a position that is clearly within the broad description of the bargaining unit as certified by the Board, that the employer commits an unfair labor practice by unilaterally declaring the position excluded from the bargaining unit as confidential." Beaver County Community College, 23 PPER ¶23070 at 159 (Final Order, 1992), *aff'd*, 24 PPER ¶24110 (Court of Common Pleas of Beaver County, 1992); Crestwood Educational Support Personnel Association v. Crestwood Area School District, 46 PPER 23 (Final Order,

² Initially, the District argues that the Charge alleges only that the District removed the position of Registration Secretary from the bargaining unit such that the PDO must be reversed. However, paragraph 7 of the Charge specifically avers, *inter alia*, that the District "removed Ms. Lopez's work and duties from the Association's bargaining unit." As such the Hearing Examiner did not misconstrue the Charge filed by the Union.

2014); Hazleton Area Education Support Personnel Association v. Hazleton Area School District, 37 PPER 30 (Proposed Decision and Order, 2006). Here, there is no question that the new position of Administrative Assistant is within the broad scope of the "non-professional employees" delineated in the Union's certification of "all business office personnel." Further, the District admits that it designated the position as "confidential" without filing a unit clarification with the Board.

The District's contention that it had previously negotiated for the exclusion of administrative assistants from the bargaining unit as confidential employees is without merit, and further, the very argument advanced by the District in this case was rejected by the Board in Crestwood, *supra*. In Crestwood, the bargaining unit certified by the Board included all secretarial positions. However, after the retirement of a bargaining unit secretary, the District posted that vacant position as a "confidential" position with pay, benefits and work hours which were not consistent with the CBA. The District did not file a unit clarification petition with the Board, nor did it bargain with the Union over the removal of the position from the bargaining unit. Therefore, the Board concluded that the District had violated PERA when it unilaterally removed the position from the unit, stating as follows:

The District's reliance on the contractual recognition clause for its unilateral action is misplaced. The fact that the contract may indicate that confidential employees are not with the Board-defined bargaining unit is insufficient to establish a contractual privilege that even arguably suggests that the [Union] agreed to allow the District to unilaterally create a new, non-bargaining unit confidential position and have that new employee performing bargaining unit work.

Id. at 83. The same result must obtain in this case because the District designated the new "Administrative Assistant" position for Ms. Lopez as confidential under PERA with an hourly wage outside the pay scale prescribed by the CBA without filing a unit clarification petition with the Board.

Finally, citing to AFSCME, Council 13 v. Department of Public Welfare (Warren State Hospital), 18 PPER ¶18158 (Final Order, 1987), and AFSCME, Council 13 v. Department of Public Welfare, 20 PPER ¶20005 (Final Order, 1988), the District asserts on exceptions that even though the remedy ordered by the Hearing Examiner is "customary," it nevertheless should be tailored because the Registration Secretary position vacated by Ms. Lopez remained in the bargaining unit, and as such, "no employees have lost jobs wages or benefits." However, the District's argument in this regard presents a fundamental misunderstanding of the remedy imposed by the Hearing Examiner.

First, we agree that the Hearing Examiner's remedy is a customary remedy to restore the *status quo ante* in response to an employer designating a newly created position as "confidential" and outside the bargaining unit and assigning that newly created position bargaining unit work. The Hearing Examiner's remedy to restore the purchasing and requisition orders to a member of the bargaining unit is clearly remedial to the unilateral removal of that work. Further, contrary to the District's argument, the Hearing Examiner did not direct that the District could not create an Administrative Assistant position or that Ms. Lopez could not perform the purchasing and requisition orders as a bargaining unit Administrative Assistant. The Hearing Examiner's Order merely states that to remedy the District's unilateral

declaration of Ms. Lopez's position of Administrative Assistant as confidential and a non-bargaining unit position, the District must treat that Administrative Assistant position as a bargaining unit position until such time as the District and Union agree to the removal of bargaining unit work to a confidential employe, or the District files a unit clarification petition with the Board seeking removal of the Administrative Assistant in the Administrative Services office as a confidential employe under PERA.

Indeed, the Hearing Examiner's directive reads "[i]mmediately return ... the Administrative Assistant position currently held by Rebecca Lopez to the bargaining unit and provide Lopez the pay (on a prospective basis only), benefits and working conditions stated in the CBA." (PDO at 8). Nowhere in that Order does the Hearing Examiner direct that Ms. Lopez be demoted to the Registration Secretary position, or that her pay as the Administrative Assistant must be her prior contractual rate as a BOP I. All the Order entails is that, prospectively, Ms. Lopez receive pay, benefits and working conditions commensurate with the position of an Administrative Assistant under the CBA.³

Following 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 transferring a portion of bargaining unit work out of the unit to the new position of Administrative Assistant unilaterally deemed confidential and outside the bargaining unit by the District. Further, the Hearing Examiner did not err in fashioning an appropriate remedy for the District's unfair practice violation to restore the *status quo ante*. Accordingly, the Board shall dismiss the District's 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 the East Stroudsburg Area School District are dismissed, and the March 29, 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.

³ If a comparable position is covered by the CBA, the District is required to pay Ms. Lopez in accordance therewith. In this regard, we note that wages for 2022 includes a Business Office II position at the hourly rate of \$21.92. (Joint Exhibit 2). If there is no comparable salary for an Administrative Assistant under the CBA, the District must negotiate the wages and benefits thereof with the Union.

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AFFIDAVIT OF COMPLIANCE

East Stroudsburg Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it has immediately returned the requisition and purchase orders duties and the Administrative Assistant position currently held by Rebecca Lopez to the bargaining unit and prospectively provided Ms. Lopez with the pay, benefits and working conditions stated in the CBA; that it has posted a copy of the Final Order and Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union 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