

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION :  
ASSOCIATION :  
v. : Case No. PERA-C-10-393-E  
ABINGTON HEIGHTS SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On November 1, 2010, the Abington Heights Education Association (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Abington Heights School District (District) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act).

On November 29, 2010, the Secretary of the Board issued an order and notice of hearing in which the matter was assigned to a conciliator for the purpose of resolving the dispute by mutual agreement of the parties and March 29, 2011 in Scranton was assigned as the time and place of hearing, if necessary before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

On February 1, 2011, the examiner continued the hearing to June 21, 2011, on the motion of the District without objection from the Association.

The hearing was held on the rescheduled day. At that time, the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The hearing examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

**FINDINGS OF FACT**

1. That Abington Heights School District is a public employer within the meaning of Section 301(1) of the Act.
2. That the Abington Heights Education Association is an employe organization within the meaning of Section 301(3) of the Act.
3. Since 1971, the Association has been certified by the Board as the exclusive bargaining representative for all professional employes who are employed by the District, including teachers (full time and part-time) (N.T. 16-17, 23, Association Exhibits 1, 2 at page 1).
4. The Association's unit certification covers all teachers who perform any kind of teaching or instructional work for the District, regardless of the subject matter or course material that is being covered. (N.T. 17-18; Association Exhibit 1)
5. Teachers in the Association's bargaining unit perform all work related to the education, instruction, and teaching of the District's students, including presentation of academic material, impartment of knowledge and concepts, evaluation of academic progress, assessment of student performance (grading), counseling, and providing any other guidance or support necessary to ensure academic success. (N.T. 17-19, 26).
6. The teachers in the Association's bargaining unit have teaching certificates issued by the Pennsylvania Department of Education, which grant teachers the authority to instruct in a public school system. (N.T. 19)

7. For at least the past 29 years, all teaching and instructional services that have been offered by the District have been performed exclusively by members of the association's bargaining unit. (N.T. 20-21, 25-26).

8. The courses that appear in the District's "High School Curriculum Planning Guide" have always been taught, exclusively, by the Association's bargaining unit members. (N.T. 25, 139; Association Exhibit 3).

9. The courses that appear on the District's high school and middle school class schedules have always been taught, exclusively, by bargaining unit members. (N.T. 29-30, 34-35; Association Exhibits 4 and 5).

10. In the past, the District regularly augmented its curriculum and offered new courses and subject matters (examples: science electives, forensics, science-based technology). In every case, the District used a teacher from the Association's bargaining unit to teach the new class or subject matter and never used a non-bargaining unit person to teach the class. (N.T. 21-22)

11. Before the 2010-2011 school year, the District offered courses in five "world languages": Spanish; French; German; Russian and Latin. (N.T. 24)

12. Sometime before the 2010-2011 school year, the District's Board of Directors expressed a desire to expand the language program to include either or both Arabic and Chinese, believing these were emerging and important languages for the students to study. (N.T. 85)

13. At the start of the 2010-2011 school year, the District started offering a sixth world language, Mandarin Chinese. (N.T. 23, Association Exhibit 3)

14. As is true with other world languages, classes for the Mandarin Chinese appeared in the District's High School Curriculum Planning Guide and in the District's class schedules for the Middle School and High School. (N.T. 27-29; Association Exhibit 3, at 39-43; Association Exhibit 4)

15. In the Spring of 2010 (prior to the 2010-2011 school year), the District conducted a search for an employee to teach the Chinese language classes and interviewed three candidates. (N.T. 86, 90-91, 116-119, District Exhibit 1)

16. The Collective Bargaining Agreement (CBA) between the Association and District, at Article XIV, requires the District to post all vacancies and new openings for bargaining unit work. (Association Exhibit 2, at 7(Article XVI)

17. When searching for an employee to teach the Chinese classes, the District followed the CBA and posted for the job opening in the Spring of 2010. (N.T. 86, 90-91, 116-119, District Exhibit 1)

18. Had the District found someone through the posting process, the District would have hired the person under the terms of the CBA, paid the teacher pursuant to the CBA's salary schedule, and the teacher would have been a bargaining unit member. (N.T. 120-121)

19. Despite the posting process, the District did not hire a teacher under the CBA and did not use a bargaining unit member to teach the Chinese language classes. Instead, the District used Xiaojing Wang, an instructor from the University of Henan, in China. Ms. Wang was teaching in the United States in conjunction with a program offered by the University of Henan's Confucius Institute and the University of Scranton's Asian Studies Department. (N.T. 31, 90-91)

20. Ms. Wang was not a member of Association's bargaining unit and not an employee of the District. (N.T. 31, 90-91)

21. The District did not pay Ms. Wang any salary or compensation for teaching the Chinese language classes. Ms. Wang, instead, received her pay from the University of Henan. (N.T. 31-32, 40-42, 57, 90-91; Association Exhibit 6, at 1)

22. Throughout the 2010-2011 school year, Ms. Wang taught three courses that were offered by the District at its Middle School and High School. (N.T. 31-32, 34; Association Exhibit 6, at 3 (e-mail from District's superintendent))

23. Ms. Wang taught the classes every day of the week; and every week of the year. (N.T. 34)

24. This workload was consistent with the assignment of a part-time teacher in the Association's bargaining unit. (N.T. 43)

25. When teaching the Chinese language classes, Ms. Wang performed the same teaching and instructional Work that has always been performed, exclusively, by the Association's bargaining unit members, including presenting academic material, imparting knowledge and concepts, and evaluating and grading student academic progress and student projects. (N.T. 35-38, 64-65, 92)

26. While Ms. Wang was teaching the Chinese language classes, no teacher from the Association's bargaining unit was assisting or overseeing her. (N.T. 37)

27. Similar to the bargaining unit work of the Association, Ms. Wang's teaching and instructional Work required a teaching certificate from the Pennsylvania Department of Education. (N.T. 44-46)

28. The District obtained the teaching certificate for Ms. Wang. (N.T. 82-83, 129-130)

29. The District also checked Ms. Wang's employment credentials and obtained a background and criminal history check for Ms. Wang. (N.T. 82-83, 129-130)

30. The District provided Ms. Wang with a car to use for travel between her housing at the University of Scranton and her teaching assignments at the high school and middle school. (N.T. 57, 91, District Exhibit 4)

31. The District paid a \$2,000 honorarium to the University of Scranton to offset the costs of the program. (N.T. 57, District Exhibit 4)

32. The District listed Ms. Wang's name in the high school and middle school class schedules, alongside the teachers who are in the Association's bargaining unit. (Association Exhibits 4 and 5).

33. On its website, the District advertised Ms. Wang to the general public as a member of its World Languages faculty. (N.T. 52-53; Association Exhibit 10)

34. When teaching the Chinese language classes, Ms. Wang used rooms at the District's facilities and worked alongside the Association's bargaining unit members. (N.T. 30, 33-34; Association Exhibits 4 and 5)

35. Before using Ms. Wang to teach the Chinese language classes, the District never obtained the consent of the Association, never bargained the issue with the Association and never informed the Association that it would use a non-bargaining unit person to teach the Chinese language classes. (N.T. 38-41; Association Exhibit 6)

36. When the Association learned the District was using Ms. Wang, the Association met with the District's Superintendent, Dr. Michael Mahon, and objected to the use of a non-bargaining person to teach the Chinese language classes. The District did not desist in using Ms. Wang and continued to use her for the remainder of the school year. (N.T. 42-43; Association Exhibit 6, at 2(Paragraph three)

37. For the 2011-2012 school year, the District has continued to offer Chinese language classes. The classes again appear in the High School Curriculum Planning Guide and in the district's class schedules (alongside the other classes taught exclusively by the Association's members). (N.T. 48-51; Association Exhibits 8 and 9)

38. In the 2011-2012 school year, the District is no longer using Ms. Wang to teach the Chinese language classes. Instead, the District is using a similar collegiate program and instructor from Taiwan to teach the classes, with the same arrangements that were in place for the 2010-2011 school year. (N.T. 54-57)

39. At the hearing, the District's Superintendent stated his intention to use an instructor from the University of Henan through the 2011-2012 school year and, possibly, even farther into the future. (N.T. 56)

40. The Northeastern Intermediate Unit (IU) rents a classroom from the District and performs instructional services on the District's premises. (N.T. 59, 65-66).

41. Those instructional services have always been offered by the IU, not the District, and the teachers in that classroom have always been employees of the IU, not the District. (N.T. 59, 67-68)

42. In addition, the IU services students from other school districts, as well as from the District. (Tr. 59)

43. The IU classes are not listed in the District's High School Curriculum Guide. (N.T. 68, 77)

44. Recently, the IU offered educational services by operating a classroom for emotionally disturbed children. The District then decided to perform those educational services itself. Once the District took over the classroom, IU employees no longer worked there. Instead, the District hired a special education teacher and therapeutic support specialist, who are both members of the Association's bargaining unit. (N.T. 93-94, 121-122)

45. The District does not do the following things for IU teachers: (1) post for their open positions; (2) obtain their teaching certificates; (3) review their credentials before their employment; (4) or obtain their background and criminal checks. Those functions are performed by the IU. (N.T. 129-131)

46. Some of the District's high school students take classes at the Lackawanna County Career Technology Center (CTC or Vo-Tech School) and the Empire Beauty School for cosmetology. Those classes have been offered by only the Vo-Tech School and Empire Beauty School and never by the District. (N.T. 60-62, 69-70)

47. Neither the Vo-Tech nor Empire cosmetology classes appear in the District's High School Curriculum Guide. (N.T. 69-70, 75-77)

48. The District does not do the following things for Vo-Tech or cosmetology teachers: (1) post for their job openings; (2) obtain their teaching certificates; (3) review their credentials before their hiring; or (4) obtain their background and criminal checks. Those functions are performed by the Vo-Tech and Cosmetology schools (N.T. 82-83, 129-131)

49. When a woodshop teacher at the District retired, the District permanently closed its woodshop program and no longer offered those educational services. Only then did the District send its students to the Vo-Tech to receive instruction in woodshop. (N.T. 113-114)

50. In the past, the District has offered dual enrollment courses, where its students attend the University of Scranton, take college level courses, and receive college credit. (N.T. 63)

51. The dual enrollment program is offered due to Act 46 of the Pennsylvania School Code, 24 P.S. § 16-1601-B, et seq., on a "Concurrent Enrollment Agreement" between the District and the University of Scranton, and on the existence of state grant money. (N.T. 63, 71-72, 128-129)

52. The Dual Enrollment Courses do not replace the high school classes that are taught exclusively by the Association's members. (N.T. 63-64, 71-73)

53. The Dual Enrollment courses are taught outside the normal school day. (N.T. 78)

54. At the present time, the governmental funding for the Dual Enrollment Program has been completely eliminated, and it is uncertain whether the District will offer Dual Enrollment Courses in the future. (N.T. 63, 111)

55. When students are suspended or expelled, they no longer receive instruction in the District and instead receive their education through "homebound teachers" who have never been part of the Association's bargaining unit. (N.T. 138-139, 144)

56. More recently, the District has provided instruction to "homebound" students through an on-line company called "Lincoln Interactive." The Association did not object to the on-line instruction because the underlying service (education of homebound students) has never been bargaining unit work, has never been covered by the Association's Collective Bargaining Agreement, and the on-line services are not counted toward high school credit. (N.T. 138-139, 146)

57. Regarding the Chinese language classes, the Association has never, at any time, given its consent for the District to use a non-bargaining unit member to teach the classes. (N.T. 42).

#### DISCUSSION

The Association alleges that the District has violated PERA by diverting bargaining unit work, specifically the teaching of Mandarin Chinese to its middle school and high school students. The chronology of the case and the essential facts are set forth above.

A public employer commits an unfair practice in violation of Section 1201(a)(1) and (5) when it unilaterally transfers bargaining unit work exclusively performed by bargaining unit members to non-members of the bargaining unit. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978).

A removal of bargaining unit work may take one of two forms. As the Board and the Commonwealth Court have recognized:

An unfair labor practice occurs when an employer unilaterally removes work that is exclusively performed by the bargaining unit without prior bargaining with the union .... An employer also commits an unfair labor practice when it alters a past practice related to assignment of bargaining unit work to non-unit members or varies the extent to which members and non-members of the unit have performed the same work.

City of Jeannette, 890 A.2d 1154, at 1159 (citing, AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)).

The District's first defense to the charge is that the teaching of Mandarin Chinese is not bargaining unit work because the Association members have never taught the subject

before. Indeed, the District has never offered Mandarin Chinese before the 2009-10 school year.

In order for the complainant to prove a transfer of bargaining unit work, the complainant must prove either that the work was exclusively that of the Association or that the employer's decision "varied the extent to which members and non-members of the unit have performed the same work ." Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011); Wyoming Valley West School District, 32 PPER ¶ 32008 (Final Order, 2000) and Lake Lehman School District, 37 PPER 56 (2006)

That the Association members have never taught Mandarin Chinese does not provide the District with a valid defense. In offering Mandarin Chinese, the District has simply expanded its offerings in the world languages department, subjects that have always been the work of the Association's members. In the words of the District Superintendent, the school board "expressed a desire to expand our language program to include either or both Arabic and Chinese, believing these were emerging and important languages for our students to study." By expanding its world languages department to include Mandarin Chinese, the District was required to fulfill its obligation to the Association. This obligation includes the duty to bargain over the wages, hours and terms and conditions of employment for person teaching the subject. The District's ability to obtain a teacher of Mandarin Chinese at low cost does not remove the District's bargaining obligation.

The District's second defense is that the District's use of an outside entity to teach Mandarin Chinese is within the District's managerial prerogative of offering students new educational opportunities. The Board has noted that a public employer's desire to offer a new course does not remove the duty to bargain. In Tredyffrin-Easttown School District, supra., 43 PPER 11 (Final Order, 2011) the Board made the following cautionary statement:

Contrary to the District's contention, the bargaining unit work is not the specific course taught, but the teaching and assessment of students in whatever courses are offered by the District. A change in subject matter or introduction of different courses does not justify a unilateral removal of that work from the bargaining unit. Even if the District's current professional employes were not certified in a newly-offered subject matter, the fact that a new bargaining unit employe may need to be hired or a current employe may need to be trained to teach the course, does not justify the District's removal of the work of teaching the students from the bargaining unit. Pennsylvania State Police, supra.

Id at 38.

Accordingly, this defense is not accepted.

The District's third defense is that the District's use of an outside entity to teach Mandarin Chinese simply continues the longstanding pattern of the Association consenting to the District's offering courses taught by non-bargaining unit entities. The District points to special education courses taken through the NEIU, vocational courses at the Lackawanna County Career Technology Center, cosmetology courses at the private Empire Beauty School and homebound instruction for suspended students via the Lincoln Interactive on-line program.

None of the examples cited by the District involved courses that had ever been taught by Association members and later ceded to non-bargaining entities. The evidence shows that the work cited by the District has always been performed by non-bargaining unit members. Accordingly, the District's examples are not valid instances of the

Association agreeing to the transfer of bargaining unit work. Accordingly, this defense will not be accepted.

The District's contends there is one recent example of an outside entity doing bargaining unit to which the Association has specifically agreed as part of settling a grievance over the same issue. Until recently, the District had offered its secondary students the opportunity to take dual enrollment courses at the University of Scranton. The students obtain early college credit from these courses. The District argues that this practice permits it to now use non-bargaining unit entities to teach Mandarin Chinese. On closer analysis, the dual enrollment analogy suggested by the District is inapposite.

The dual enrollment course concept was addressed by the Board in Palisades School District, 37 PPER 168 (Final Order, 2005). The Board held that the Association did not prove that the District transferred bargaining unit work when it set up a dual enrollment program which allowed high school students to take college courses. The Board reasoned that the General Assembly, in enacting an amendment to the School Code for the Dual Enrollment Program, Act 46, 24 P.S. §§ 16-1605-B, had made it clear that it was primarily a way for Districts to offer students the chance to obtain college course credit, that it was a supplement to the core curriculum of public school districts and that the choice of the college instructors was outside the control of the District. The Board held,

However, contrary to the Union's position here, the implementation of concurrent enrollment programs at high schools throughout the Commonwealth and the provision of grant monies to fund those programs is governed by a statutory amendment to the School Code of 1949, known as "Act 46," Act 46 formulates and identifies the concurrent courses as college courses, the unique nature of which is unlike other new or old high school courses traditionally introduced and provided by the District. Act 46 defines a concurrent course as a "postsecondary course", i.e., a college course.  
24 P.S. §§ 16-1602-B. The Act further requires that the concurrent courses are actually developed, provided and presented by an eligible college, not a high school. 24 P.S. §§ 16-1605-B.

Id. at 525.

This District has in the past also offered the dual enrollment courses as supplements to the regular curriculum under the same statute. Current funding problems have put the program's future in doubt. When they were offered, the dual enrollment courses were under the control of the University of Scranton. Conversely, in the present case, when the District offered Mandarin Chinese, the District maintained significant control over the Mandarin Chinese teachers and the courses taught by them. As outlined in the findings of fact, the teachers are members of the District's world languages department; they use the District's classrooms and facilities; their backgrounds are checked by the District and their Pennsylvania teaching certifications are obtained by the District. The teachers teach subjects from the District's curriculum guide, not college courses. There is no factual analogy to the dual enrollment college courses, which, as stated above are not bargaining unit work in any event. Accordingly, this defense is not accepted.

The unilateral diversion of the bargaining unit work of teaching this particular world language is a violation of the District's duty to bargain and is an unfair practice in violation of Section 1201(a)(1) and (5) of PERA. In order to remedy this unfair practice, the usual remedies in a diversion of bargaining unit work case will be ordered, namely that the District cease and desist from this arrangement and that the District return to the status quo until the matter is bargained with the Association. The Association has also requested that the Board order the cancellation of the contract.

However, in the interest of stability and in recognition that the students are in the middle of the school year, it is appropriate to allow the current arrangement to continue to the end of the school year so that the course instruction may conclude as planned.

#### CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That the Abington Heights School District is a public employer within the meaning of Section 301(1) of the Act.
2. That the Abington Heights Education Association is an employe organization within the meaning of Section 301 (3) of the Act.
3. That the Board has jurisdiction over the parties hereto.
4. That the District has committed unfair practices in violation of Section 1201(a)(1) and (5) of the Act.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

##### HEREBY ORDERS AND DIRECTS

that the District shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the Act.
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action:
  - (a) Announce that at the end of the 2011-12 school year, it is rescinding any contracts, work appointments and other assignments the District has entered into regarding the assignment of Mandarin Chinese classes to non-bargaining unit members;
  - (b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
  - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance.

##### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of February, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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**AFFIDAVIT OF COMPLIANCE**

The Abington Heights 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 announced that at the end of the 2011-12 school year, it is rescinding any contracts, work appointments and other assignments entered into regarding the assignment of Mandarin Chinese classes to non-bargaining unit members; that it has posted the proposed decision and order as directed and that it has served a copy of this affidavit on the Association.

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Signature/Date

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Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

Signature of Notary Public