

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLENTOWN EDUCATION ASSOCIATION :
PSEA/NEA :
v. : CASE NO. PERA-C-14-370-E
ALLENTOWN CITY SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On November 20, 2014, the Allentown Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Allentown City School District (District) violated Section 1201(a) (1) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the District unlawfully subcontracted and diverted bargaining unit work by hiring non-unit tutors to perform tutoring during the school day where all tutoring during the school day had been historically and exclusively provided by bargaining unit employes.

On December 17, 2014, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on June 5, 2015, in Harrisburg. Before testimony was taken at the hearing on that date, the District moved to defer the charge at this case number. (N.T. 13-25). After hearing arguments from both parties' attorneys, I denied the motion for deferral. (N.T. 25). During the hearing, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On September 21, 2015, the Union filed its post-hearing brief. The District filed its post-hearing brief on October 23, 2015.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4)
3. Debra Tretter has been the Union President for the past six years. She represents approximately 1,100 professional employes in 26 school buildings at the District. She is a full-release President. (N.T. 43-45, 48, 56; Joint Exhibit 1 at 19, Article 28)
4. Corinne Fecho is the PSEA Uniserv Representative who serves and supports District bargaining unit members and the Association. (N.T. 45)
5. Christina Mazzella is the Executive Director of Human Resources for the District. Ms. Mazzella works in the administration building and not in any of the school buildings. She does not observe any tutoring or teaching. (N.T. 26, 137)
6. Dr. Tina M. Belardi is the District's Chief Academic Officer. (N.T. 36; Association Exhibit 3)
7. Kim Walck is the Director of Grants at the District. She gives direction regarding who can be used as a tutor. (N.T. 84-85)
8. Between 2011 and 2014, the District eliminated approximately 380 positions through attrition and furlough. (N.T. 53-54)
9. Ms. Mazzella informed Ms. Tretter that the District developed "Study Seminars." (N.T. 52)
10. On July 22, 2014, Ms. Mazzella emailed Ms. Tretter and Ms. Fecho informing them that the District received a grant to fund daytime tutors and that the District planned to hire daytime tutors. The email provided that "since this is during the school

hours our teachers will be unable to do this type of tutoring." (N.T. 27-28, 45, 71; Association Exhibit 1)

11. Ms. Mazzella's July 22, 2014 email further provided: "We wanted to apprise you so that you are aware since these tutors will not fall under the contract and will not be paid at the \$30 an hour rate. The time these tutors are in the building throughout the day is about 4 hours." (Association Exhibit 1)

12. On August 14, 2014, Dr. Belardi sent a memo to Dr. C. Russell Mayo, the District's Superintendent at the time, requesting school board approval of two grants: (1) a School Intervention Grant and (2) a 21st Century Community Learning Centers Grant for the 2014-2015 school year. The School Intervention Grant is for tutoring during the school day, and the 21st Century Grant is for tutoring after school. (N.T. 36, 62; Association Exhibit 3)

13. The memo provides, relevant to school intervention grants, as follows;

School Intervention Grants will support students by using effective strategies to close the achievement gap for all students at: Central Elementary School-\$69,699, Cleveland Elementary School-\$69,699, Jefferson Elementary School-\$79,699, South Mountain Middle School-\$79,699, Louis e. Dieruff High School-\$69,699, William Allen High School-\$59,699.

(Association Exhibit 3)

14. The District used the School Intervention Grant money to pay tutors to work during the school day. (N.T. 36-37, 61, 97; Association Exhibit 7)

15. On November 19, 2014, Ms. Tretter emailed Ms. Mazzella inquiring about the School Intervention Grant tutors approved in August 2014. The email further provides, in relevant part, as follows:

There is a teacher who just started tutoring 3 days a week at Cleveland, by the name of Brenda Fix. I believe she is considered a day-day sub. However, she is working 7 hours per day for 3 days a week. Her salary is \$24/hr. She is being called an Intervention Teacher.

I have been told that there may be 2 such tutors at Allen, one of whom has been a day-day sub this year at Allen. I am waiting to hear back from a rep over there about these two people.

I am concerned about these positions for several reasons. I would appreciate it if you would get back to me with information about these employees.

(Association Exhibit 7)

16. On December 3, 2014, Ms. Mazzella sent an email to Ms. Tretter containing the estimated scheduled for the newly hired tutors. This email provided as follows:

Both tutors will work full days-7:20 to 2:50.

Susan is scheduled Monday, Tuesday, Thursday.

Bruce is scheduled Monday, Thursday, Friday.

The days of the week may vary, depending on scheduled or unscheduled school closures.

(Association Exhibit 2)

17. According to Ms. Mazzella's December 3, 2014 email, two tutors were scheduled three days per week during the school day for full days at William Allen High School. (N.T. 32-34)

18. Brenda Fix is one of the School Intervention Grant tutors at Cleveland Elementary School. She works three full days per week regularly and consistently. Ms. Tretter saw her working with students in the Moser Gymnasium, but she did not hear the interaction between Ms. Fix and the students. Ms. Tretter testified: " I can't imagine what she would be saying, other than teaching." Bruce Moyer and Susan DiGiacomo are

School Intervention Grant tutors at William Allen High School. (N.T. 57-58, 64, 75-76; Association Exhibits 6, 7 & 8)

19. Interventionist Specialists are members of the bargaining unit. The position has salaries and benefits provided by the professional bargaining unit collective bargaining agreement. (N.T. 33, 38-39; Association Exhibit 4)

20. The District used the grant money to directly hire School Intervention Grant tutors. Brenda Fix and Bruce Moyer are not listed in the board book (i.e., school board meeting minutes) as having been hired by the District, but Susan DiGiacomo is listed in the board book. The District did not, at any time, bargain with the Union over the use of School Intervention tutors during the school day. (N.T. 40-42, 62-63, 74; Association Exhibit 8)

21. Substitutes are not hired directly by the District; they are hired through a contractor called Substitute Teacher Services (STS). Substitutes hired through STS do not have their names included in the board book because they are not directly hired by the District. Substitutes hired before the District contracted with STS have been converted to STS. The District hired the School Intervention Grant tutors before it contracted with STS in January 2015. (N.T. 90-91, 93, 136-137)

22. The District uses both day-to-day substitutes and salaried substitutes. Day-to-day substitutes are not bargaining unit members. After ninety days, a substitute is converted to a salaried substitute and falls under the collective bargaining agreement retroactively for the professional unit. If the District knows that a teacher will be out for ninety days or more, the substitute is salaried under the collective bargaining agreement from the beginning. (N.T. 91-92)

23. Tutoring is a form of intervention. Tutors assist students, both inside and outside the classroom, who have been identified by teachers as needing support. They fill in the gap of learning in a specific area of knowledge for the student. Intervention Specialists also determine which students need support. The School Intervention Grant tutors tutored during the school day during the 2014-2015 school year. The Union stipulated and agreed that the District utilized tutors during the school day before the 2014-2015 school year. (N.T. 87-89, 94, 98)

24. Intervention Specialists are teacher certified, and they do more in depth tutoring than what a tutor does. The Intervention Specialists design the intervention which is more responsibility than the tutor. The District has offered after-school tutoring in other years. (N.T. 131-133; Association Exhibit 4)

25. A priority school is a school that has been identified by the Pennsylvania Department of Education (PDE) as having low test scores and needing assistance for its students to increase those scores. A school with a focus school rating by PDE is one where the students have very low scores. (N.T. 113-115; District Exhibit 4)

26. Focus and priority schools can use Title I funding for tutoring. There are five schools in the District that have been identified as focus schools and one in the District that has been identified as a priority school. The District can use Title I funding to pay teachers for after school tutoring. The District does pay bargaining unit members with Title I funding. (N.T. 115, 141; District Exhibit 4)

27. Instructional paraprofessionals are in a different bargaining unit than the teachers. They assist teachers with students in reading and math. Unlike tutors, the instructional paraprofessionals are inside the classroom at all times. (N.T. 121-123; District Exhibit 5)

28. On December 9, 2014, the Union filed a Level III Grievance complaining that the part-time tutors during the school day are regular part-time professionals who should be included in the professional bargaining unit and should be receiving pay and benefits pursuant to the professional collective bargaining agreement. (Board Exhibit 1)

29. The Grievance provides, in relevant part, as follows:

Part-time tutors have been hired by the District to provide professional services to ASD [Allentown School District] students during the school day. The Association is aware of three teachers hired in this capacity, to date: one at Cleveland Elementary School and two at William Allen High School. This grievance

is brought on behalf of all affected teachers who may be known or unknown to the Association now or in the future.

Part-time tutors hired for these positions are working at least 21 hours per week, on a regular schedule, at a salary of \$24/hr. It is not known what other benefits are being provided to teachers in these tutoring positions.

Article I of the current CBA recognizes part-time professional employees as members of the Association. Members of the Association must be paid appropriately according to our salary schedule even as part-time employees including any other earned benefits including but not limited to sick time, lunch, and tuition reimbursement.

Remedies:

1. Provide salary and benefits to part-time tutors per the terms and conditions of the current CBA.
- 2.
3. Reimburse affected part-time tutors retroactively for loss of salary and benefits as members of the AEA Bargaining Unit to date, immediately.
4. Any other awards deemed appropriate by the arbitrator.

(Board Exhibit 1)

DISCUSSION

1. Deferral Motion

The District asserts in its post-hearing brief that, in denying the District's motion for pre-arbitral deferral at the beginning of the hearing in this case, I did not provide my rationale for denying the motion. (District's Post-hearing Brief at 2). In this regard, the District states that it "would appreciate it if [I] would share [my] reasoning in the Proposed Decision and Order, as it would help the School District to understand how, if at all, the Board's policy regarding pre-arbitral deferral in cases that do not include allegations of discrimination or retaliation has changed or is currently being applied." (District's Post-hearing Brief at 2). On the record, I denied the District's deferral motion because the grievance and the Unfair Practice presented two different issues for disposition. I stated on the record that the statutory cause of action before the Board was not predicated upon a contractual analysis. Although my position has not changed, I will reiterate the relevant exchange that occurred at the hearing and further explain my reasoning here for the District.

The Board's policy toward pre-arbitral deferral has not changed nor has its application of **Pine Grove Area School District**, 10 PPER ¶ 10167 (Order Deferring Unfair Practice Until Further Order of the Board, 1979). Under **Pine Grove**, the Board will defer matters to the grievance arbitration procedure where a grievance has been filed that is rooted in the parties' collective bargaining agreement and there was no discrimination alleged. The unfair practice charge in this case sets forth allegations that the District unlawfully diverted the bargaining unit work of tutoring during the school day to non-bargaining unit tutors. The unfair practice claim and the remedies therein sought are not rooted in the parties' collective bargaining agreement, and are not the same questions presented or remedies sought by the grievance, which are indeed rooted in the parties' contract.

In the Grievance, the Union contends that the part-time tutors, who perform tutoring during the school day, are regular part-time professionals who should be included in the professional bargaining unit and should be receiving pay and benefits pursuant to the professional collective bargaining agreement. In the Grievance, the Union expressly cites to the recognition clause contained in Article I of the collective bargaining agreement, which provides that regular part-time professional employees are members of the bargaining unit. The Grievance further requests that the tutors receive contract pay and backpay for the difference and reimbursement for other contractual benefits withheld.

In presenting the motion, the District argued the following:

MS. KELLY: Well, the unfair labor practice makes the allegation that the tutors were performing work that, you know, belonged historically to the bargaining unit, with which we disagree.

But my point is, the place you would look, these involved the same people, very related issues.

And the issue ultimately comes down, what does the collective bargaining agreement say? Because that's where the answer's going to be found to both of these questions.

Because obviously, if they're alleging that we failed to bargain collectively, the first thing we could do is say, well, here's the collective bargaining agreement. And now let's get into it and see what it says.

(N.T. 17)

My response, and my rationale for denying the motion, was as follows:

HEARING EXAMINER MARINO: But aren't they two different issues? If the grievance is saying, under the collective bargaining agreement you should be paying people this amount of money, it's a different question than my decision that you diverted the bargaining unit work.

Because the contract can't address people who are not part of the bargaining unit and not being paid according to the contract.

So where's the contractual provision that applies to people who aren't in the unit?

(N.T. 18). To which the District's attorney responded:

MS. KELLY: Well, that would certainly probably be one of the District's defenses. But this has been moved to arbitration. We're going there. We've selected an arbitrator.

(N.T. 18). The District subsequently argued in support of its deferral motion that the issue of whether the tutors should be paid according to the contract is "wrapped up in the same issue" of whether the tutors are in the bargaining unit and, therefore, whether the District diverted bargaining unit work. (N.T. 19). I disagree.

The Union filed the grievance under the collective bargaining agreement, on behalf of the tutors, requesting that they be included in the bargaining unit and that they receive pay and benefits under the contract. The Union filed the instant unfair practice claim alleging that those same tutors are not in the bargaining unit and that the work they are doing belongs to employees in the unit. The arbitrator is being asked to determine whether tutors should be included under the contract because they are regular part-time, professional employees and not day-to-day substitutes, as they have been so characterized by the District. For purposes of this unfair practice litigation, both parties have taken the position that the School Intervention Grant tutors are not in the professional unit and their placement is not before me for consideration. The Union is not seeking to change their unit membership status in the claim before the Board, and I cannot change that status here.¹ My inquiry is focused on determining whether the work that the tutors are performing has been historically and exclusively performed by the bargaining unit.

The Union has taken two inconsistent positions regarding the placement of the tutors in the unit in each forum to allow it to pursue two completely different legal questions in each forum. The purpose of the Board's deferral policy is to avoid inconsistent results on the same legal questions involving the same facts, legal analysis and parties, in a manner somewhat similar to the way courts apply collateral estoppel,

¹ Certainly, the Union could have filed a petition for unit clarification seeking the inclusion of the tutors in the professional bargaining unit where it would have the burden of proving that the tutors were both professional and regular part-time employees.

while recognizing that arbitrators have greater expertise in contract interpretation questions. Deferral is proper when the unfair practice claims involve the same contract-based cause of action contained in the grievance. The Board's deferral policy is not designed to avoid the Board's expertise in and jurisdiction over statutory unfair practice questions, as here. The fact that the Union may have two litigation opportunities to achieve a desired result, albeit not the same result, is not determinative of deferral under **Pine Grove, supra**.

The distinction between the statutory question before the Board and the contractual question before the arbitrator becomes manifest where, in the event the arbitrator concludes that the tutors are not covered by the contract and I had already deferred, the Union would be unable to seek the return of the work to the unit because the arbitrator is without jurisdiction, under the grievance or the contract, to address the statutory issue of whether the bargaining unit work was unlawfully removed from the professional bargaining unit. In the same vein, if the arbitrator concludes that the School Intervention Grant tutors are covered by the professional collective bargaining agreement, and therefore included in the bargaining unit, the effect of that conclusion will be that there would no longer be a diversion of work, when the District complies with such an award, where the focus is on the bargaining unit status of the tutors.

Therefore, an arbitrator's possible sustaining of the grievance, which may render the unfair practice question inconsequential or moot, is an insufficient basis for deferral where an award dismissing the grievance leaves the statutory question unanswered after deferral. The possibility of mootness does not mean that the question before the Board is "wrapped up in the same issue" before the arbitrator. Simply stated, the claims presented before the Board are not rooted in the parties' collective bargaining agreement and, therefore, fail to satisfy the unchanged requirements of **Pine Grove**, adopted long ago and consistently applied by the Board to this day.

The very reason why the Board does not defer cases that involve the same claims as contained in a grievance, where the matter is rooted in the parties' collective bargaining agreement and where discrimination is also alleged, is because the statutory question of discrimination, within the unique jurisdiction of the Board, cannot be addressed or remedied by an arbitrator. Such is the case here. Although discrimination is not alleged, there is a separate statutory cause of action here that is not rooted in the parties' contract and that an arbitrator has no jurisdiction to address or remedy. Accordingly, deferral is not proper in this case. The possibility that one outcome of arbitration may moot the unfair practice claims is not a consideration for deferral under **Pine Grove, supra**. In responding to the District's argument in support of deferral at the hearing, I explained that "they [the tutors] may not [belong] in the unit because they are not regular, but that doesn't mean that they're allowed to perform work formerly done by the unit. *That's a different question.*" (N.T. 24).

2. Unfair Practice Charge

In support of its unfair practice charge, the Union argues that the District unlawfully assigned workday tutoring, previously performed by educators and Interventionist Specialists, to day-to-day substitutes under the School Intervention Grant, without bargaining. (Union's Post-hearing Brief at 6-7). Workday tutoring, argues the Union, had been exclusively performed by bargaining unit members and was a significant portion of the duties of the Intervention Specialists. (Union's Post-hearing Brief at 6). Bargaining unit members provide workday tutoring during "study seminars" and Intervention Specialists provide classroom based interventions tutoring students. (Union's Post-hearing Brief at 7). The Union maintains that, although the Intervention Specialists have additional duties other than tutoring such as analyzing data, tutoring is a key, substantial portion of their duties, if not the essential component of their duties, and was therefore bargaining unit work. (Union's Post-hearing Brief at 7).

In **Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman Sch. Dist.**, 37 PPER 56 (Final Order, 2006), the Board stated the following:

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers **any** bargaining unit work to non-members without first bargaining with the unit." **City of Harrisburg v. PLRB**, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis original). In establishing an unfair practice for the removal

of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). **City of Allentown v. PLRB**, 851 A.2d 988 (Pa. Cmwlth. 2004). Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. **AFSCME, Council 13 v. PLRB**, 616 A.2d 135 (Pa. Cmwlth. 1992); **City of Jeanette v. PLRB**, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." **Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist.**, 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing **AFSCME, supra**).

Lake Lehman, 37 PPER at 179.

The District argues that tutoring is not professional work and the School Intervention Grant tutors at the District do not belong in the professional bargaining unit, citing **In the Matter of the Employees of State College Area School District**, 39 PPER 96 (Proposed Decision and Order, 2008). (District's Post-hearing Brief at 7). The District also argues that the Union did not prove that tutoring during the school day was historically and exclusively performed by the bargaining unit members. (District's Post-hearing Brief at 7-8). The District maintains that tutoring and other work with students individually or in small groups during class time is a job duty that has belonged to the instructional paraprofessionals who are not in the professional bargaining unit. (District's Post-hearing Brief at 8).

Contrary to the Union's assertions, contends the District, the Association did not present any evidence that teachers ever tutored during the school day in "study seminars" or that they were the only ones who performed tutoring during the school day. (District's Post-hearing Brief at 9). The District further emphasizes that the only evidence that a non-bargaining unit day-to-day substitute was working with children was the testimony of Ms. Tretter that she observed Ms. Fix with a student in the gymnasium at Moser Elementary School in November 2014. However, Ms. Tretter did not hear what Ms. Fix was saying to the student and could not verify whether tutoring was occurring. (District's Post-hearing Brief at 9). Also, the District argues that there is no evidence to support the Union's claims that Intervention Specialists perform tutoring as part of their duties. (District's Post-hearing Brief at 10). Any evidence regarding non-unit tutors in December 2014 should not be considered as supportive of the charge as it post-dates the charge. (District's Post-hearing Brief at 9).

I agree with the District that the Union did not meet its burden of proving that the professional bargaining unit historically and exclusively tutored students. Two witnesses presented testimony in this case. The Union called Ms. Mazzella and Ms. Tretter. The District called Ms. Mazzella. Both witnesses were extremely credible, knowledgeable professionals and demonstrated an absolute command of the information within their area of expertise. However, neither witness was competent to testify about, or had first-hand knowledge of, the job duties of tutors and who performed those duties. Moreover, the District properly objected, on multiple occasions during the hearing, to the hearsay nature of Ms. Tretter's testimony.

The Board makes determinations about position placement and bargaining unit work based on record evidence of actual job duties. **Washington Township Municipal Authority v. PLRB**, 569 A.2d 402 (Pa. Cmwlth. 1989); **Dormont Borough**, 41 PPER 66 (Proposed Order of Unit Clarification, 2010). Ms. Mazzella is the Executive Director of Human Resources and works in the administration building, not in any school buildings. Although she testified from job descriptions and a human resources understanding of the purpose and duties of tutors as compared to bargaining unit professionals, Ms. Mazzella has not observed tutors or teachers. Ms. Mazzella did not possess first-hand knowledge of the relevant job duties of teachers or tutors. Ms. Mazzella's testimony that teachers also tutor and that

Intervention Specialists in the bargaining unit do more than tutor also provides merely conclusory statements about tutoring and do not help me compare job duties of the bargaining unit members' historical duties to the duties of the Grant tutors. (N.T. 109, 132-133).

Similarly, Ms. Trettter is the Union president who is currently released from her teaching duties. Ms. Tretter also did not observe the alleged tutoring duties performed by either teachers or tutors and much of her testimony was based on hearsay. The only behavior that Ms. Tretter actually observed was when she saw Ms. Fix with a small group of students in the Moser gymnasium. In this context, Ms. Tretter testified that she could not hear what transpired between the students and Ms. Fix, although it looked like tutoring. Ms. Tretter testified, with respect to observing Ms. Fix's tutoring: "I can't imagine what she would be saying, other than teaching." Ms. Tretter is an accomplished and respected veteran educator, and she is properly revered in her leadership of the Union. I am sure that her assessment of Ms. Fix's interaction with the students (i.e., that Ms. Fix was tutoring) is accurate. However, even her professional supposition is simply not competent evidence of tutoring.

Although the Union argues that the professional unit was performing tutoring duties during the school day in "study seminars," there is no substantial, competent evidence from any witness with first-hand knowledge about what occurred during "study seminars." Ms. Tretter's understanding about "study seminars" is based on hearsay. To the extent that Ms. Mazzella conveyed to Ms. Tretter the nature of "study seminars," the record does not establish that Ms. Mazzella observed the "study seminars." Therefore, the record does not establish the competency of Ms. Mazzella to testify about the content of the "study seminars" or the teachers' involvement with them.

Ms. Tretter also testified that tutoring was performed by bargaining unit members. But again there is no testimony from a witness who observed historical, factual details that constituted tutoring by bargaining unit members. Ms. Tretter also testified that she knew that the job duties of the Grant tutors were teacher duties. (N.T. 55-57). She testified that instructional support teachers are members of the bargaining unit and they work with students on a one-on-one basis or in small groups. (N.T. 55-57). Ms. Tretter testified that she knows this because, as Union President, she is in the schools and she has seen her members doing their jobs. (N.T. 57). The problem with this testimony is there are no details about the job duties performed by either the teachers or the Grant tutors. There are only conclusory statements that teachers have done tutoring and the Grant tutors are performing tutoring duties. The record simply lacks factual details about what those respective duties are or how they compare.

Historical facts support conclusions of law. Bald conclusions (that Grant tutors are performing the same or overlapping tutoring duties historically performed by teachers) do not establish, by Board standards, that teachers in fact have historically performed the same or overlapping tutoring duties. In other words, the Union has attempted to establish a favorable legal conclusion by asserting the legal conclusion and not the detailed, historical facts to support it.

In this regard, the Union could have called one or more School Intervention Grant tutors to testify about their actual job duties and one or more professionals in the bargaining to testify about their detailed factual history of tutoring students, or any number or combination of individuals who aurally and visually observed tutors and/or bargaining unit members tutoring. Accordingly, the record does not establish that the District has engaged in unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

CONCLUSIONS

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

1. The District is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has **not** committed unfair practices within the meaning of Section 1201(a) (1) or (5).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of October, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner