COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNCREST EDUCATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-12-385-W
	:	
PENNCREST SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On December 24, 2012, the PENNCREST Education Association (Association or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against PENNCREST School District (District or Respondent) alleging that the District violated sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA).

On January 8, 2013, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and July 10, 2013 in Harrisburg was assigned as the time and place of hearing if necessary, before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

The hearing was necessary, but was continued to August 19, 2013, at the request of the District without objection from the Association. The hearing was held on the rescheduled day, at which time the parties were afforded a full opportunity to present testimony, introduce documentary evidence and cross-examine witnesses. The Association submitted a post-hearing brief on October 10, 2013. The District submitted a post-hearing brief on December 23, 2013.

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

FINDINGS OF FACT

1. PENNCREST School District is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act.

2. PENNCREST Education Association is an employee organization within the meaning of Section 301(3) of PERA.

3. Since 1973, the Association has been the exclusive representative for all full-time and regular part-time professional employes of the District. (N.T. 13, Association Exhibit 1)

4. The District and the Association are parties to a collective bargaining agreement for the professional employes for the 2009-10 through the 2012-13 school years. (N.T. 17, 153, Association Exhibit 4).

5. Through the end of the 2011-2012 school year, the District employed a registered, certified dental hygienist to be responsible for a Pennsylvania Department of Health approved program providing dental health services to students as mandated by the Pennsylvania School Code. (N.T. 13-14; Association Exhibit 1)

6. The dental hygienist position has been included in the professional bargaining unit since 1973. (N.T. 13, 153, Association Exhibit 1)

7. Deanna Harrison has held the position of dental hygienist since 2003. (N.T. 94)

8. In 2012, the District and the Association entered into mid-contract term negotiations to reduce expenses due to budget concerns. On June 7, 2012, the District and the Association entered into a tentative addendum to the CBA which

modified several terms for the 2012-13 school year. The Association permitted the District to reduce step movement and tuition reimbursement, and agreed to additional insurance contributions. In exchange the District agreed to no further staff reductions. The tentative agreement also provided

> There will be no program cuts. Some positions may be eliminated in certain programs primarily through attrition. The exception is that the dental hygiene program will be eliminated at the start of the 2012-13 school contract year. If any work done by the dental hygienist in the past is performed by other parties, the Association will take appropriate action.

(N.T. 52, 153, Association Exhibit 9)

9. On June 13, 2012, the District notified Harrison that it was intending to suspend her from employment effective August 26, 2012, "due to the curtailment of the Dental Hygiene Program[.]" (N.T. 171-172, Association Exhibit 10)

10. As the dental hygienist, Harrison had four main areas of responsibility: performing dental screening examinations on individual students in kindergarten, third grade and sixth grade for those students not receiving dental examinations by their family dentist; coordinating and implementing a supplemental fluoride tablet program for students in the two elementary schools in municipalities without fluoridated water; providing supplemental dental health education to students and maintaining accurate dental records in students' files. (N.T. 96, 97, Association Exhibit 11.)

11. In addition, Harrison performed various other duties as part of the Dental Hygiene Program including making referrals and arranging for follow-up treatment for students following their screening examinations, arranging for the mobile dentist program to come to the District to serve students in grades K-8 and facilitating the District's participation in the Childrens' Dental Health Month Poster Contest. (N.T. 100, 117, Association Exhibits 12 & 13.)

12. Harrison testified that the overwhelming amount of her time as dental hygienist was taken up by dental screening examinations, the fluoride program and the paperwork and follow-up associated with those duties. (N.T. 107-108)

13. 70% of her total work time was spent organizing, scheduling, performing and following up on student dental screening examinations. (107-108).

14. Harrison estimated that the classroom interaction and lesson plans accounted for approximately 10% of her work. (N.T. 109)

15. Harrison estimated that the fluoride program accounted for 15% of her time. (N.T. 113)

16. On July 9, 2012, the District and the Association signed an addendum to the CBA which included, *inter alia*, the elimination of the dental hygiene program:

> There will be no program cuts for the 2012-13 year. Some positions in particular programs may be eliminated primarily through attrition. The exception is that the dental hygiene program will be eliminated at the start of the 2012-13 school contract year.

(N.T. 24, 216, District Exhibit G)

17. On October 11, 2012, the District's Board of Directors approved contracts with three local Dentists to do dental examinations in accordance with the Pennsylvania School Code in the three elementary attendance areas of the District, for students in kindergarten, third and seventh grades. (N.T. 36-37, 183-186, Association Exhibit 6, District Exhibits K, L and M)

18. On November 29, 2012, the District also reconstituted its supplemental fluoride tablet program under the direction of Curriculum Director Andy Wheeling, who then delegated responsibility for portions of the program to building principals, secretaries and aides. These positions are not in the bargaining unit. (N.T. 41, 190-192; Association Exhibit 8; District Exhibits O and P)

19. The numerous recordkeeping responsibilities involved in connection with both the student dental screening examinations and the fluoride tablet program were delegated to the building Principals who directed the building aides and secretaries to perform much of this work. (N.T. 61-65, 202-204.)

DISCUSSION

The Association's charge of unfair practices alleges that the district is utilizing non-bargaining unit persons to do the work of the dental hygienist position after the District furloughed Deanna Harrison from the position. The Association alleges that this transfer of bargaining unit work was done without bargaining with the Association.

A public employer violates Sections 1201(a)(1) and (5) of PERA when it unilaterally transfers 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).

The public employer desiring to transfer bargaining unit work has an "affirmative duty to seek out the representatives of its employes, announce its intentions and provide the employe representative with relevant information necessary for it to fulfill its bargaining obligation." **Faculty Fed. of Comm. College of Philadelphia Local 2026, AFT AFL-CIO v. Philadelphia Community College**, 25 PPER ¶25172 (Proposed Decision and Order, 1994), citing **AFSCME, District Council 89 v. Lancaster County**, 24 PPER ¶ 24054 at 132 (Final Order, 1993)

The Public School Code mandates that school children receive dental examinations or dental hygiene services at three times before the seventh grade. The Code states, in relevant part,

§ 14-1403 Dental examinations and dental hygiene services

(a) All children of school age, in the Commonwealth, (i) upon original entry into the school, (ii) while in the third grade and (iii) while in the seventh grade, *shall* be given a dental examination by a school dentist: Provided, however, That this requirement shall not apply to those school districts or joint school boards which have instituted a program of dental hygiene services as provided in subsection (b) of this section.

(b) Any school district or joint school board may institute a provision of dental hygiene services for children of school age, which program shall be approved by the Secretary of Health, and for that purpose may employ dental hygienists.

24 P.S. § 14-1403 (Emphasis added by hearing examiner).

For over 40 years, through the end of the 2011-12 school year, the District chose to comply with the School Code by having a dental hygienist provide dental hygiene services. The dental hygienist, Deanna Harrison, was a bargaining unit position.

In 2012, facing budget difficulties, the parties negotiated an addendum to the CBA for the 2012-13 school year in which the Association made concessions in return for the District's promise not to furlough employees. The Addendum also provided that the District was eliminating the dental hygiene program in the coming school year. On June 13, 2012, the District notified Harrison that it was suspending her effective August 26, 2012.

The dental hygienist position held by Harrison had four major parts: performing screening examinations on individual students in kindergarten, third and seventh grades; coordinating and implementing a supplemental fluoride tablet program; providing supplemental dental health education to students and maintaining accurate dental records in students' files. According to the testimony of Harrison, the overwhelming amount of her time as dental hygienist was taken up by dental screening examinations, the fluoride program and the paperwork and follow-up associated with those duties. Seventy percent (70%) of her total work time was spent organizing, scheduling, performing and following up on student dental screening examinations.

When the 2012-13 school year began, the District began using dentists to deliver the School Code mandated dental examinations. On October 11, 2012, the District's board of directors approved contracts with two private dental services to do yearly examinations for students who did not receive their own dental exams. On November 6, 2012, the District's Curriculum Director Andrew Wheeling sent parents permission slips for the fluoride. When these permission slips were returned to the school, they were assigned to a non-unit secretary or non-unit nurse technician. The building secretary was maintaining fluoride records and the nurse, a (bargaining unit position?) was refilling fluoride bottles.

The Association contends that the District's actions prove that the District has not eliminated the dental hygiene program but merely transferred the work to other entities outside the bargaining unit without first meeting its bargaining obligation to the Association.

Because of the unique facts of this case as well as the interplay with the School Code mandate for dental examinations and PERA's mandate to bargain the removal of bargaining unit work, this case requires an analysis of each of the dental hygienist's duties before and after her furlough.

The first part of the duties is the District's use of dentists to perform dental examinations. Section 1403 of the School Code mandates that students "shall" receive a dental examination in kindergarten, third and seventh grade, unless districts choose to have as an alternative a dental hygienist program approved by the Secretary of Health. 24 P.S. 14-1403. For years, the District chose the alternative of having a dental hygienist perform dental screening examinations as part of a dental hygiene program. However, in 2012, the parties agreed to eliminate the dental hygiene program.

The District argues that because of the agreement to eliminate the dental hygiene program, the District had no choice but to use dentists to provide dental examinations pursuant to the state mandate. The District argues that under the Addendum agreement, the Association has no basis to contest the District's use of dentists to comply with the state mandated dental screening examinations requirement. The District's argument is based on the Board's rulings recognizing the defense of contractual privilege. In **Jersey Shore Area School District**, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the sound arguable basis test as set forth in **NCR Corp.**, 271 NLRB 1212, 117 LRRM 1062 (1984):

> When an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the [NLRB] will not enter the dispute to serve the function of arbitrator in determining which parties' interpretation is correct.

18 PPER at 175.

The District's defense of contractual privilege for this part of the dental hygienist's work is well taken. Accordingly, in light of the agreement to eliminate the dental hygiene program, the District has a sound arguable basis that it is using the alternative method of dental examinations mandated by the School Code.

The second part of the duties is the hygienist's coordinating and implementing a supplemental fluoride tablet program. This part of the dental hygienist's duties is another matter. The fluoride program is not statutorily mandated. If the District was being true to the agreement to eliminate the dental hygiene program, then it would not have revived the fluoridation program in the new school year without fulfilling its bargaining obligations under PERA. It is not allowed to transfer this work to a non-unit employe without first approaching the Association with its proposal and then offering to bargain with the Association.

The public employer desiring to transfer bargaining unit work has an "affirmative duty to seek out the representatives of its employes, announce its intentions and provide the employe representative with relevant information necessary for it to fulfill its bargaining obligation." **Philadelphia Community College, supra.** 1993)

As for the third part of the dental hygienist's duties, education, it is not clear who is doing the dental health education that Harrison performed. Accordingly, I am not able to address this issue.

Finally, the fourth part of the dental hygienist's duties is student record keeping. In the new arrangement, secretaries and building aides took on record keeping duties Harrison had done that were associated with the dental screenings and the fluoride programs. Consistent with the analysis above, the District will be allowed to use non-bargaining unit employes to do record keeping relating to the state mandated dentists' examinations. However, the District should cease and desist from using non-bargaining unit employes to do record keeping relating to the fluoride program that had been the dental hygienist's work before the 2012 school year.

CONCLUSIONS

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

1. That PENNCREST School District is a public employer within the meaning of Section 301(1) of PERA.

2. That PENNCREST Education Association is an employe organization within the meaning of Section 301(3) of PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the District has committed unfair practices in violation of Sections 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

District shall:

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

2. Cease and desist from refusing to bargain collectively with the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. Cease and desist from transferring the bargaining unit work of the fluoride distribution program and record keeping for that program to non-unit individuals.

4. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:

(a) Reinstate the dental hygienist's fluoride distribution work and record keeping for that work to the bargaining unit;

(b) Pay Deanna Harrison the amount of wages and fringe benefits she would have earned had the fluoride distribution work and record keeping for that work not been transferred outside the bargaining unit;

(c) 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;

(d) 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 and

(e) Serve a copy of the attached affidavit of compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this sixteenth day of June, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner