

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OIL CITY EDUCATION SUPPORT :
PROFESSIONALS, PSEA/NEA :
 :
v. : Case No. PERA-C-17-362-W
 :
OIL CITY AREA SCHOOL DISTRICT :
 :

PROPOSED DECISION AND ORDER

On December 20, 2017, the Oil City Education Support Professionals, PSEA/NEA (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Oil City Area School District (District or Employer), alleging that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally removing bargaining unit work.

On January 8, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on April 11, 2018, in Pittsburgh, if necessary. The hearing was subsequently continued to May 23, 2018.

The hearing ensued on May 23, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The District filed a post-hearing brief on July 18, 2018. The Union filed a post-hearing brief on July 23, 2018.

The 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. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)

3. The Union is the exclusive bargaining agent for a unit of nonprofessional employes at the District. (Joint Exhibit 3)

4. The Union and the District are parties to a collective bargaining agreement, which is effective from July 1, 2015 through June 30, 2020. (Joint Exhibit 3)

5. The bargaining unit members have performed cafeteria work at the District for the past 25 years. The cafeteria work consists of monitoring and cashier duties, such as watching the students, lining them up for their lunches, helping them open condiment packets and other food items, and making sure they are sitting down and being safe. (N.T. 14-16)

6. The bargaining unit members have performed the cafeteria work in both stand-alone specific cafeteria positions, as well as paraprofessionals who are assigned monitoring duties in the cafeteria. (N.T. 15)

7. The bargaining unit members have not performed the cafeteria work exclusively. The unit shared the cafeteria work with the District's teachers until the beginning of the 2017-2018 school year. (N.T. 17; Joint Exhibit 1)

8. At the start of the 2017-2018 school year, the District began using employees of Nutrition, Inc. to perform cafeteria work. The Nutrition employees were previously limited to management of the cafeteria operation, which changed in 2017-2018. The District began using the Nutrition employees for cafeteria work after announcing that it had a surplus in the cafeteria funding during a School Board meeting prior to the 2017-2018 school year. (N.T. 17-18, 29, 44)

9. In the years prior to the 2017-2018 school year, the number of bargaining unit members performing the cafeteria work fluctuated from year to year. (Joint Exhibit 1)

10. In the years prior to the 2017-2018 school year, the proportion of the cafeteria work performed by the bargaining unit members fluctuated from year to year. (Joint Exhibit 1)

11. Union President Robin Echenoz testified that the hours spent by unit members performing the cafeteria work did not vary widely over the years. (N.T. 16)

12. In 2016-2017, the bargaining unit members did not perform work as cafeteria monitors at the high school. The teachers performed the cafeteria monitoring duties at the high school. (Joint Exhibit 2)

13. In 2017-2018, the bargaining unit members did not work as cafeteria monitors at the high school. Nutrition, Inc. employees performed the cafeteria monitoring duties at the high school. (Joint Exhibit 2)

14. In 2016-2017, there were four lunch periods at the Middle School, each of which was 40 minutes in length. There were no bargaining unit members who performed monitoring duties during the first lunch period. The remaining three lunch periods were monitored by one unit member and one or two teachers. Each bargaining unit member monitored the entire lunch period. (Joint Exhibit 2)

15. In 2017-2018, there were four lunch periods at the Middle School, each of which was 40 minutes in length. Each period was monitored by one bargaining unit member and two Nutrition employees. However, the bargaining unit members only monitored the last 10 minutes of the period after they finished their 30-minute lunch. (Joint Exhibit 2)

16. In 2016-2017, there were two lunch periods at Smedley Elementary School, one for Kindergarten and one for First Grade. Each period was 30 minutes in length and was monitored by one bargaining unit member. In addition, one bargaining unit member worked as a cashier during each lunch period for 15 to 20 minutes and then monitored the lunch room for 10 to 15 minutes. A third bargaining unit member monitored one student for 15 minutes during the Kindergarten lunch period. Non-bargaining unit employees did not perform any monitoring or cashier duties. (Joint Exhibit 2)

17. In 2017-2018, there were two lunch periods at Smedley Elementary School, one for Kindergarten and one for First Grade. Each period was 30

minutes in length. Each period was monitored by one bargaining unit member and two Nutrition employees. In addition, the bargaining unit cashier/monitor position was eliminated. One Nutrition employee worked as a cashier/monitor during each lunch period. (Joint Exhibit 2)

18. In 2016-2017, there were three lunch periods at Seventh Street Elementary School, each of which was 30 minutes in length. Each period was monitored by two bargaining unit members. One of those bargaining unit members held a three-hour position and worked all three lunch periods. One non-bargaining unit teacher performed the work in question during the second of the three lunch periods, and a second non-unit teacher performed the work during the third of the three lunch periods. (Joint Exhibit 2)

19. In 2017-2018, there were three lunch periods at Seventh Street Elementary School, each of which was 30 minutes in length. Each period was monitored by one bargaining unit member and two Nutrition employees. The three-hour bargaining unit lunch monitor position was eliminated. (Joint Exhibit 2)

20. In 2016-2017, there were three lunch periods at Hasson Heights Elementary School, each of which was 30 minutes in length. Six bargaining unit members monitored the first lunch period, while five bargaining unit members monitored the second and third. Two bargaining unit members held three-hour positions and worked all three lunch periods. There were not any non-bargaining unit employees performing the monitoring duties. (Joint Exhibit 2)

21. In 2017-2018, there were three lunch periods at Hasson Heights Elementary School, each of which was 30 minutes in length. Six bargaining unit members monitored the first lunch period, along with two Nutrition employees. Three bargaining unit members and two Nutrition employees monitored the second, while five bargaining unit members and two Nutrition employees monitored the third. Two bargaining unit members held three-hour positions and worked all three lunch periods. (Joint Exhibit 2)

22. UniServ Representative Robert Myers conducted an investigation and prepared a summary in connection therewith, which revealed, in relevant part, that at the Middle School: in 2016-2017, the unit performed 120 minutes of the cafeteria work per day, while non-unit employees performed 240 minutes per day. In 2017-2018, the unit performed 40 minutes of the cafeteria work per day, while non-unit employees performed 320 minutes per day. At Smedley Elementary School, in 2016-2017, the unit performed 135 minutes of the cafeteria work per day, while non-unit employees performed zero minutes per day. In 2017-2018 at Smedley, the unit members performed 60 minutes of the cafeteria work per day, while non-unit employees performed 120 minutes per day. At Seventh Street Elementary School, in 2016-2017, the unit performed 180 minutes of the cafeteria work per day, while non-unit employees performed 60 minutes per day. In 2017-2018 at Seventh Street, the unit performed 90 minutes of the cafeteria work per day, while the non-unit employees performed 180 minutes per day. At Hasson Heights Elementary School, in 2016-2017, the unit performed 480 minutes of the cafeteria work per day, while non-unit employees performed zero minutes per day. In 2017-2018 at Hasson Heights, the unit performed 420 minutes of the cafeteria work per day, while non-unit employees performed 180 minutes per day. (N.T. 33-35; Association Exhibit 6)

23. Myers also conducted an investigation into the complement of the workforce and seniority status of bargaining unit members, which existed

between the end of the 2016-2017 year and the start of the 2017-2018 year. His inquiry revealed that the District laid off four paraprofessional employees, including Jamie Rybak who was specifically assigned to the lunchroom. The District also eliminated five additional positions by simply not filling them after the employees retired or resigned, which included two positions specifically assigned to the lunchroom held by K. Carter and K. Barr. (N.T. 18-19, 27-28; Association Exhibit 2)¹

24. The District did not bargain the removal of the cafeteria work with the Union. (N.T. 19, 35)

DISCUSSION

In its charge, the Union alleged that the District violated Section 1201(a)(1) and (5) of the Act² by unilaterally removing bargaining unit cafeteria work without bargaining with the Union. The District contends that it did not violate the Act because the bargaining unit members have always shared the cafeteria work with non-unit teachers. The District submits that the amount of work and bargaining unit members performing the work fluctuated on a yearly basis. As such, the District maintains that there is no discernible past practice regarding the extent to which the bargaining unit performed the cafeteria work in question.

It is well settled that the removal of bargaining unit work is a mandatory subject of bargaining and an employer commits an unfair practice when it fails to bargain with the exclusive representative before transferring bargaining unit work to an employee outside the unit. Hazleton Area Education Support Personnel Ass'n v. Hazleton Area School District, 37 PPER ¶ 30 (Proposed Decision and Order, 2006) citing Midland Borough School District v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989); PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978). The removal of **any** bargaining unit work is a per se unfair labor practice. City of Harrisburg v. PLRB, 605 A.2d 440, 442 (Pa. Cmwlth. 1992) (emphasis in original). There is no threshold amount of bargaining unit work that needs to be diverted; even a de minimis amount is actionable under PERA. Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006). Nor does it matter whether the removal of bargaining unit work resulted in the termination or layoff of bargaining unit employees, or whether the unit members lost pay; instead, the analysis is whether the unit lost work. Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011). An employer also commits an unfair practice by altering a past practice concerning the extent to which bargaining unit employees and non-bargaining

¹ Myers testified that the District recalled Amber Guiste, who was assigned to Title I Reading/Math and who had been laid off, into a child-specific position. Likewise, Myers believed that Patty Yee and Sabrina Van Wormer, who worked in Title I Reading/Math and the Kindergarten Classroom, respectively, and whose positions were eliminated, were either recalled or bumped into newly created positions. (N.T. 28-29, 36).

² Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act...(5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

unit personnel had previously shared work. Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011). The complainant in an unfair practices proceeding has the burden of proving the charges alleged. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977).

In this case, the Union has sustained its burden of proving that the District violated the Act by unilaterally removing bargaining unit work and altering a past practice concerning the extent to which bargaining unit employees and non-bargaining unit personnel had previously shared work.³ Indeed, the record shows that the bargaining unit has consistently performed the cafeteria work in question for the past 25 years. However, in 2017-2018, the District began using Nutrition employees to perform cafeteria work in places where the unit did not share the work with non-unit employees and to perform more of the cafeteria work than the non-unit teachers had performed, while also reducing the amount of cafeteria work for the bargaining unit. For example, in 2016-2017, non-unit employees did not perform any cafeteria work at Smedley and Hasson Heights Elementary School. In 2017-2018, however, the District used Nutrition employees to perform the cafeteria work for 120 minutes per day at Smedley and 180 minutes per day at Hasson Heights. The District also reduced the amount of bargaining unit work from 135 minutes per day at Smedley and 480 minutes per day at Hasson Heights in 2016-2017 to 60 minutes per day at Smedley and 420 minutes per day at Hasson Heights in 2017-2018. This clearly rises to the level of an unfair practice under the Act. Likewise, the record shows that the District used Nutrition employees to perform more cafeteria work on a daily basis in 2017-2018 than the non-unit teachers performed on a daily basis in 2016-2017 at the Middle School and Seventh Street Elementary School. What is more, the District also reduced the amount of minutes the bargaining unit performed the cafeteria work between 2016-2017 to 2017-2018 at the Middle School and Seventh Street Elementary School.

The District's argument that there is no discernible past practice regarding the extent to which the unit previously shared the cafeteria work with the non-unit teachers is rejected. The record unequivocally shows a reduction in the amount of work the unit performed at four of the District's schools as well as a corresponding increase in the amount of cafeteria work the non-unit employees performed between the 2016-2017 and 2017-2018 school years. And, although the record shows that, in the years prior to 2017-2018, the number of unit members and the unit's proportion of the work fluctuated on a yearly basis, Echenoz testified credibly that the hours spent by unit members performing the cafeteria work did not vary widely over the years. This yields an inference that the yearly fluctuations were only slight in nature. In any case, the record shows that the District laid off four paraprofessional employees before the 2017-2018 school year, including Rybak who was specifically assigned to the lunchroom. Furthermore, the District eliminated five additional positions before the 2017-2018 school year by simply not filling them after the employees retired or resigned, which included two positions specifically assigned to the lunchroom held by Carter and Barr. The record is devoid of any evidence whatsoever that the District had previously laid off employees or eliminated positions specifically assigned to the lunchroom, despite any yearly fluctuations.⁴ Therefore, on

³ The District made a motion to dismiss at the hearing following the Union's presentation of its case-in-chief. (N.T. 45-48). The motion to dismiss is denied.

⁴ Although the record shows that the District recalled Guiste into a child-specific position and possibly Yee and Van Wormer into newly created

this record, it must be concluded that the District has violated the Act by unilaterally removing bargaining unit work and significantly altering the extent to which unit members and non-unit personnel perform the cafeteria work.

CONCLUSIONS

The 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 within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has committed unfair practices in violation of Section 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

That the 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 in good faith with the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

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

(a) Immediately return the cafeteria work to the bargaining unit, reinstate the three-hour lunchroom position at Seventh Street Elementary School with back pay, rescind the contract with Nutrition, Inc. to the extent it involves the nonmanagerial cafeteria work at the District's Middle School and three Elementary Schools, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the District's unfair practices, together with six (6%) percent per annum interest;

(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;

positions, there is still a deficit of the specifically dedicated lunchroom positions between 2016-2017 and 2017-2018.

(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; and

(d) 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 7th day of November, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OIL CITY EDUCATION SUPPORT :
PROFESSIONALS, PSEA/NEA :
v. : Case No. PERA-C-17-362-W
OIL CITY AREA SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

Oil City Area School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein by immediately returning the cafeteria work to the bargaining unit, reinstating the three-hour lunchroom position at Seventh Street Elementary School with back pay, rescinding the contract with Nutrition, Inc. to the extent it involves the nonmanagerial cafeteria work at the District's Middle School and three Elementary Schools, restoring the status quo ante, and making whole any bargaining unit employes who have been adversely affected due to the District's unfair practices together with six (6%) percent per annum interest; that it has posted a copy of the Proposed Decision and Order in the manner prescribed therein; and that it has served a 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

