

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATIONAL SUPPORT: :
PERSONNEL ASSOCIATION :
v. : CASE NO. PERA-C-18-56-E
ABINGTON HEIGHTS SCHOOL DISTRICT :

AMENDED PROPOSED DECISION AND ORDER

On March 13, 2018, the Abington Heights Educational Support Personnel Association (Union or 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 (PERA or Act). The Union specifically alleged that, on November 15, 2017, the District unilaterally declared two secretarial positions as confidential and removed those positions from the bargaining unit, removed bargaining unit work along with the positions, and stopped providing the pay and other terms and conditions of employment prescribed by the parties' collective bargaining agreement (CBA).

On April 9, 2018, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on August 13, 2018, in Harrisburg. After granting two continuance requests, I rescheduled the hearing for April 12, 2019, in Harrisburg. On November 28, 2018, the District filed a petition for unit clarification at Case No. PERA-U-18-304-E seeking to remove the same two secretarial positions from the existing unit, alleging that both positions are confidential and/or supervisory under PERA. The Secretary of the Board consolidated the District's unit clarification petition, for hearing purposes, with the Union's unfair practice charge, and both matters were heard on April 12, 2019. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses for both cases. On July 22, 2019, the Union filed its post-hearing brief on the unfair practice charge. The District filed its post-hearing brief on September 3, 2019. Although the unfair practice charge and the petition for unit clarification were consolidated for hearing, this order only addresses the charge.

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. 5)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. The parties stipulated and agreed that the Board's certified bargaining unit description includes all District secretaries. The unit description also excludes all management level, supervisory and confidential employes. (N.T. 19; Joint Exhibit 1)

4. Nettie Lowe is the secretary to the District's Superintendent. She is a confidential employe and is not in the bargaining unit. She works in the District's Administration Building. (N.T. 19, 25, 73)

5. The Human Resources Director is Penny Cistowski. Her office is in the Administration Building. Ms. Cistowski's secretary is Ellen Worthy. She works in the Administration Building, and she is in the bargaining unit. (N.T. 23-25)

6. Edey Thomas was the Secretary to the Assistant Superintendent prior to her retirement. She was a bargaining unit member, and she worked in the District's Administration Building. The District has since eliminated the position of secretary to the Assistant Superintendent. (N.T. 25, 34-35)

7. Michele McDonald and Susan O'Day are District employes who work in the District's Administration Building. Prior to November 15, 2017, Ms. McDonald and Ms. O'Day were in the bargaining unit. Ms. McDonald was a secretary in the Special Education Office and reported to the Special Education Director. Ms. O'Day worked in the District's Business Office in the Administration Building and reported to the District's Business Administrator/Manager. (N.T. 20, 25-26, 74)

8. In her prior bargaining unit position, Ms. O'Day typed and issued purchase orders. The total number of clerical positions at the Administration Building was reduced significantly due to advances in technology. Over the past 15 years, the District reduced clerical staff in the Administration Building by approximately eleven positions. The record does not contain substantial competent evidence of Ms. McDonald's job duties as the Secretary in the Special Education Office. (N.T. 35-38, 62-63, 68)

9. On November 15, 2017, the school board approved the appointment of Michele McDonald to the position of Coordinator of Administrative Services, at a salary of \$37,168, and designated her a confidential employe. On the same day, the school board appointed Susan O'Day to the position of Coordinator of Student Services, at a salary of \$38,725, and designated her as a confidential employe. (N.T. 26-28; Union Exhibit 1)

10. On November 16, 2017, Ms. McDonald emailed Union Vice President, Marlene Moore, requesting that the Union stop deducting Union dues from her payroll because she had a new position that was not in the bargaining unit. At no time did the District notify the Union that it was appointing Ms. McDonald to the position of Coordinator of Administrative Services, that it was appointing Ms. O'Day to the position of Coordinator of Student Services or that it was designating those two positions as confidential. At no time did the District bargain with or obtain consent from the Union regarding the removal of Ms. McDonald and Ms. O'Day from the bargaining unit. The school board designated both appointments as "non-certificated." (N.T. 27-33, 50; Union Exhibit 1)

11. Under the pay scale provided in the CBA for bargaining unit secretaries, Ms. McDonald would be paid \$33,611.85. Her current salary is not listed in the CBA pay scale. Ms. O'Day's current salary is higher than the highest salary listed on the CBA pay scale for bargaining unit secretaries. (N.T. 29-30; Union Exhibit 1; Joint Exhibit 4)

12. The position of Coordinator of Administrative Services and the position of Coordinator of Student Services did not exist prior to the effective date of November 16, 2017. (N.T. 31-32)

13. The vacancy in the position of secretary in Special Education created by Ms. McDonald's appointment to the position of Coordinator of

Administrative Services is currently filled by a Kelley Services employee, Lisa Greco, which is permitted by the CBA. (N.T. 34, 36-37)

14. Dr. Michael Mahon is the District's Superintendent. Jim Maria is the UniServ Representative for the PSEA. He was a math teacher at the District for 19 years. For the five years before he left to become a UniServe Representative for the PSEA, he was the President of the teachers' union at the District. Mr. Maria was also the teachers' union Vice-President for approximately 14 years before he was the President. Dr. Mahon told the Union's PSEA UniServ Representative, Jim Maria, that he removed the two positions from the bargaining unit because he believed that the CBA authorized it. (N.T. 39-42, 47-48)

15. Article XXIV of the parties' CBA provides as follows:

USE OF CONTRACTORS

The District retains the right to utilize outside contractors at its discretion to perform any work within the District, provided only that the performance of such work shall not cause the loss of regular work hours for any current employee.

(Joint Exhibit 4)

16. Article XXV of the parties' CBA provides as follows:

SUPERVISORS

It is agreed that supervisory and management employees have the right to perform any work in the District including work which is otherwise performed by members of the bargaining unit, provided only that the performance of such work shall not cause the loss of regular work hours for any current employee.

(Joint Exhibit 4)

17. During his discussion with UniServe Representative Maria, Dr. Mahon specifically referenced the provisions of the CBA that permitted contractors to perform any work within the District and the ability for managers and supervisors to perform bargaining unit work under Articles XXIV and XXV. (N.T. 45)

18. On November 27, 2018, approximately one year after the District appointed Ms. McDonald and Ms. O'Day to their new positions, the District filed a unit clarification petition seeking to remove the two positions from the bargaining unit. (N.T. 52; Joint Exhibit 3)

19. James Mirabelli has been the Business Administrator for the District for eight years. Mr. Mirabelli has been heavily involved in contract negotiations for both collective bargaining agreements and private contracts. Mr. Mirabelli is in charge of accounting for the District. He is responsible for District expenses, insurances and budgets. In her current position as Coordinator of Student Services, Ms. O'Day works in the Business Office reporting to Mr. Mirabelli. Her cubicle is approximately 15 feet from Mr. Mirabelli's office door. (N.T. 24, 60-61, 64-65, 70)

20. The school board members request that Mr. Mirabelli develop strategies for collective bargaining negotiations. In pursuit of those strategies, Mr. Mirabelli develops different models based on different financial offers including various adjustments to wages and health insurance. Mr. Mirabelli has requested that Ms. O'Day compile and contribute data necessary for Mr. Mirabelli's financial modeling for negotiations. (N.T. 64-67)

21. Ms. O'Day is actively involved in the District's preparations for information used in collective bargaining negotiations. The teachers' contract expired in 2017, and Ms. O'Day prepared documents and information for bargaining with the teachers in 2018. She investigates and accumulates information from other school districts. She organizes her information on spreadsheets that contain dollar figures from other districts placed under categories such as salaries, health, dental and vision insurance, as well as types of extra pay such as coaching duties. Ms. O'Day and Mr. Mirabelli discuss which fact-finding data to include in the spreadsheet of information to be used and presented in bargaining and the tactical reasons for selecting certain data. (N.T. 64-67, 79-80)

22. As the Coordinator of Administrative Services, Ms. McDonald reports to the Assistant Superintendent, Marc Wyandt. She manages and provides data to the federal government to demonstrate compliance with federally funded programs. (N.T. 67-70)

23. Ms. McDonald manages the English-as-a-Second-Language (ESL) Program. In that capacity, she coordinates with the ESL teachers, works with families who have students in the ESL Program and conducts screenings for the Program. Excluding Title III programs, the District received \$270,000 in federal funding for the 2018-2019 school year. (N.T. 89-92)

24. Ms. McDonald manages the roster of Title I students. She is the point of contact for the reading specialists and building principals. She ensures that all student information is correctly entered into the student information system and ensures that the appropriate information is provided to students' families. Ms. McDonald collects civil rights and demographic data for federally funded programs to provide to federal monitors. Ms. McDonald works with the Director of Technology and the Director of Student Services to reconcile discrepancies in reporting civil rights and other demographic data and compiles an accurate data report for the federal government. (N.T. 91-94, 99-100)

25. Ms. McDonald manages the teacher evaluation system. She assigns administrators to the staff members that they are to evaluate. She manages the evaluation documents as they are submitted and completed and delivers them to the Superintendent for signature. (N.T. 94)

26. Marlene Moore is the Guidance Secretary at the District. She works in the High School Building. She is also the Vice President and Membership Chair of the Union, in which capacity she monitors Union membership. She visits the Administration Building approximately once per year to deliver checks. Ms. Moore's contact with Ms. O'Day and Ms. McDonald has been through the occasional phone call or email. (N.T. 17-18, 22-23)

27. The Board's bargaining unit certification describes the unit as follows:

All full-time and regular part-time nonprofessional employees including but not limited to secretaries, bookkeepers, clerks, cafeteria personnel, aides, maintenance personnel, custodial personnel, bus drivers, van drivers, crossing guard, and mailman; and excluding all supervisors, first level supervisors, management level employees, confidential employees and guards as defined in the Act.

(Joint Exhibit 1)

DISCUSSION

The Union argues that the District unlawfully declared two new/renamed positions exempt from the coverage of the Act, created the positions outside of the bargaining unit and removed bargaining unit work in violation of PERA. (Union Brief at 6). The Union contends that the record undisputedly establishes that secretaries are in the bargaining unit covered by the CBA for pay, benefits and conditions of employment. Susan O'Day and Michele McDonald were bargaining unit secretaries before they were appointed to Coordinator of Student Services and Coordinator of Administrative Services respectively. The Union posits that the District unilaterally declared both positions to be confidential without bargaining with the Union or seeking a Board ruling. (Union Brief at 5-6).

The District, however, argues that Ms. O'Day's and Ms. Thomas's secretarial positions were eliminated due to technological advancements that absorbed the job duties associated with that position. (District Brief at 3, 5). Since data entry and filing duties are no longer necessary, leaving only typing duties that all employees perform, the former positions of Secretary to the Business Manager, held by Ms. O'Day, and Secretary to the Assistant Superintendent, held by Ms. Thomas, were eliminated. (District Brief at 3). Consequently, there was no work to remove outside the bargaining unit when those positions were eliminated. (District Brief at 5).

The District further contends that the position of secretary to the Business Manager, held by Ms. O'Day, "evolved into a confidential position by way of advance[d] knowledge of negotiations strategy. . . ." (District Brief at 3). The District maintains that it was entitled to create confidential positions and fill them through promotion, as it did in this case. (District Brief at 3). The District also contends that the parties' CBA allows the District to leave a position vacant or fill it with someone outside the bargaining unit as long as bargaining unit employees do not experience a reduction of hours. (District Brief at 3-4). The employees in the new positions, argues the District, perform new work which had not been done by bargaining unit employees. (District Brief at 5). The District contends that it did not remove secretarial positions, rename them and declare them excluded from the bargaining unit, as argued by the Union. (District Brief at 6).

The District also disagrees with the Union's assertion that brand new positions must automatically be included in the bargaining unit. Contrary to the Union's argument, the District posits that Board law requires new positions to be placed in the bargaining unit only when the position description is "'clearly within the broad description of the bargaining unit.'" (District Brief at 6) (citations omitted). In this case, the District contends that the job duties do not even closely resemble those within the unit and require "an entirely new level of skills not employed or required by anyone else in the bargaining unit." (District Brief at 6-7). The District asserts that the positions were not removed. Rather, one was eliminated because it was obsolete, and the other position was permissibly filled with a Kelley Services employee. According to the District, there was nothing left to remove; new positions were created and there is no law prohibiting promotions. (District Brief at 7). The District emphasizes that the only duty resembling bargaining unit work is typing, which is done by every white-collar employee and which is not exclusive to the bargaining unit. (N.T. 13-14).

In Crestwood Educational Support Personnel Association v. Crestwood School District, 46 PPER 23 (Final Order, 2014) and Penns Manor Education

Association v. Penns Manor Area School District, 30 PPER 30198 (Final Order, 1999), the Board stated that "'where an employer creates a position that is clearly within the broad description of the bargaining unit as certified by the Board. . .the employer commits an unfair practice by unilaterally declaring the position excluded from the bargaining unit.'" Penns Manor, 30 PPER at 431 (quoting Beaver County Community College, 23 PPER 23070 (Final Order, 1992), aff'd, 24 PPER 24110 (Court of Common Pleas of Beaver County, 1993). In Penns Manor, the employer created the position of Alternative Education Coordinator outside the bargaining unit. However, the old unit description in that case was not broad. The unit description was limited to teachers, school counselors, school nurses, and librarians. Consequently, the Board concluded that: "It cannot fairly be stated that the unit as described in 1970 encompassed the position of the [Alternative Education Coordinator] at the time of its creation in 1997." Penns Manor, 30 PPER at 431.

The Penns Manor Board aptly stated:

Since the 1970's, the Board has more broadly described bargaining units in part to address the problems associated with the evolution of units. The broad description allows employers to add, delete, and modify positions within a broadly described bargaining unit. . . Under this policy of unit description, professional units are more broadly described to include all full-time and regular part-time professional employees, including but not limited to specific classes of professionals. "The Board broadly defines bargaining units...to obviate the need for the filing of numerous petitions for unit clarification for the Board to make a determination on each new position created or existing classification retitled."

Penns Manor, 30 PPER at 431 (citation omitted).

In Crestwood School District, the Board further explained that it is improper to examine the proffered confidential job duties of the positions removed from the bargaining unit by the employer in an adversarial unfair practice proceeding where such an investigation into job duties is more appropriate for the Board's unit clarification process. Id. at 82. The Crestwood Board also rejected the argument that the Board's certification or the parties' contractual recognition clause, which excludes confidential employees, provides a basis for unilaterally creating a new position, designating that position as confidential without union approval and assigning bargaining unit work to the employee in the allegedly new confidential position. Crestwood, 46 PPER at 83. Crestwood stands for the proposition that an employer may only remove a position from the bargaining unit as confidential if the employer obtains agreement from the Union or files a unit clarification petition and the Board removes the position as confidential.

The bargaining unit description in this case, unlike the one in Penns Manor, is indeed a very broad all-inclusive unit description. Specifically, the certified unit description provides, in relevant part, the following all-inclusive language: "All full-time and regular part-time nonprofessional employees including but not limited to..." This language establishes a broadly defined unit description designed to accommodate the addition, deletion and modification of positions and classes of positions over time. Therefore, the unit description includes the two coordinator positions at issue in this case, and the Board has rejected the District's argument that the two coordinator positions are not clearly included within the broadly defined unit description.

In Crestwood, the Board further prohibited evaluation of the job duties of the two coordinators as a defense to the unfair practice charge for removing the two positions. Also, with respect to the alleged removal of bargaining unit work, the record does not contain substantial, competent evidence of the job duties performed by Ms. O'Day or Ms. McDonald while they occupied their former positions as secretaries in the bargaining unit. Very little evidence of the former job duties was presented, and that evidence has been discredited by the examiner because the witness who presented it did not have first hand knowledge of those duties. Other than typing, which every white collar employe in the District performs, the Union did not establish that bargaining unit work was actually removed or diverted. Additionally, the District credibly established that so many secretarial duties and positions were eliminated through the use of technology that the bargaining unit work performed by Ms. O'Day and Ms. McDonald were eliminated and not transferred.

Although the record does not establish that the District removed bargaining unit work, for purposes of potential Board review, I am addressing the District's sound-arguable-basis defense. The District cites to Articles XXIV and XXV of the parties' CBA and argues that the Union waived its right to bargain over whether bargaining unit work was removed to the two coordinators. However, Article XXIV provides that the District retains the right to utilize outside contractors to perform any work within the District. Ms. O'Day and Ms. McDonald are employes of the District and not employes of an outside contractor. Article XXIV does indeed permit the District's use of the Kelly Services employe, Ms. Greco, who filled the vacancy in the position of Secretary in Special Education formerly held by Ms. McDonald. Article XXV provides that supervisory and management level employes may also perform bargaining unit work, provided that bargaining unit members do not lose hours of work. However, there is insufficient evidence on this record to support the conclusion that either the Coordinator of Administrative Services or the Coordinator of Student Services is either management level under Section 301(16) or supervisory under Section 301(6) of the PERA.¹ Therefore, Articles XXIV and XXV are both unavailing as defenses for the District's unilateral placement of the two positions outside the bargaining unit.

Accordingly, the District engaged in unfair practices by unilaterally designating the positions of Coordinator of Administrative Services and the Coordinator of Student Services as confidential and outside of the bargaining unit. However, due to the disposition of the companion unit clarification case involving the same two positions, only the position of Coordinator of Administrative Services, held by Ms. McDonald, shall be ordered restored to the bargaining unit.

¹ The record shows that Ms. McDonald compiles and reports student data to the Federal Government required for receiving Federal funding. The record also demonstrates that she coordinates with ESL teachers and screens students for the ESL program; that she assigns administrators to the staff members that they are to evaluate; that she manages the evaluation documents as they are submitted and completed; and that she delivers them to the Superintendent for signature. These duties, however, are insufficient to meet the test for exclusion from the bargaining unit as managerial, supervisory or confidential.

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 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 by unilaterally designating two newly created coordinator positions as confidential and placing those positions outside the bargaining unit.
5. The District has not committed unfair practices in violation of Section 1201(a)(1) or (5) under the allegation that the District removed bargaining unit work.

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 Union which is the exclusive representatives of employes in the bargaining unit herein involved, including but not limited to discussing of grievances with the exclusive representatives.
3. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:
 - (a) Immediately place the position of Coordinator of Student Services currently held by Ms. McDonald in the bargaining unit along with the work that she performs in that position;
 - (b) Immediately bargain with the Union over the salary or wage rate to be paid to the Coordinator of Student Services currently held by Ms. McDonald and thereby amend the negotiated pay scale in the parties' CBA to include the agreed upon salary for that position; and permit her to keep any potential difference between her current salary and the bargained-for salary.

(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 first day of October, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATIONAL SUPPORT: :
PERSONNEL ASSOCIATION :
v. : CASE NO. PERA-C-18-56-E
ABINGTON HEIGHTS SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

The Abington Heights 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; that it has placed the position of Coordinator of Student Services currently held by Ms. McDonald in the bargaining unit along with the work that she performs in that position; that it has bargained her pay and amended the parties' negotiated salary scale to include the salary for her position; that it has permitted Ms. McDonald to keep any potential difference between her current salary and her bargained-for salary; 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