

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SAINT MARYS AREA EDUCATION ASSOCIATION :
PSEA/NEA :
v. : CASE NO. PERA-C-18-301-W
SAINT MARYS AREA SCHOOL DISTRICT :
:

PROPOSED DECISION AND ORDER

On November 15, 2018, St. Marys Area Education Association, PSEA/NEA (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the St. Marys Area School District (District or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

On December 14, 2018, the Secretary of the Board issued a complaint and notice of hearing, in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating March 15, 2019, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was held on March 15, 2019, in St. Marys, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed its post-hearing brief on May 30, 2019. The District filed its post-hearing brief on June 10, 2019.

The Hearing 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. 7).
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8).
3. There is one middle school in the District. There are approximately 500 students in the middle school. (N.T. 19).
4. Prior to the 2018-2019 school year, there were two guidance counselors employed at the middle school: Wendy Hansloven and Kate McGonnell. These positions were in the bargaining unit. (N.T. 19, 31).
5. Hansloven went on medical leave in March, 2018, and retired at the end of the 2017-2018 school year. McGonnell was transferred to a District elementary school before the 2018-2019 school year. (N.T. 19-20, 31).

6. On or about August 27, 2018, Noel Petrosky, Principal of the middle school, sent a memo to the middle school staff which stated in relevant part: "Leah Chamberlain will be coming on full time as a counseling option for our students in [Wendy Hansloven's] position." (N.T. 20; Association Exhibit 5).

7. In the 2017-2018 school year and at the beginning of the 2018-2019 school year, Chamberlain was employed by Cen-Clear, a third-party medical services provider. Cen-Clear has a contract with the District. (N.T. 21).

8. At the end of the 2017-2018 school year, in March, Chamberlain had come to the Middle School and provided mental health counseling in the Middle School. (N.T. 21, 26-27).

9. Petrosky brought Chamberlain in because when Hansloven went on sick leave, Petrosky wanted to make sure she had support for the students. Petrosky intended Chamberlain to focus on the therapeutic and mental health needs of the students. (N.T. 87-88).

10. Petrosky had previously identified a need for more therapeutic and mental health help for the middle school. She wanted to model the services at the middle school after the high school which had more therapeutic and mental health resources for students provided by third-party employees. (N.T. 85-88).

11. The middle school's Parent Guidebook for the 2018-2019 school year lists Molly Wehler and Chamberlain as the two guidance counselors. (N.T. 23; Association Exhibit 16).

12. When the 2018-2019 school year started, Chamberlain's office was located in Hansloven's previous office in the Middle School. In the first week of November, Chamberlain was moved to another office. (N.T. 31-32).

13. Wehler has been a guidance counselor at the Middle School since the beginning of the 2018-2019 school year. She was a guidance counselor at the High School for twenty years previous to being reassigned to the Middle School. (N.T. 30).

14. Wehler's job as a middle school guidance counselor entails taking care of students' vocational, social, personal and academic well-being. She spends the majority of her work time providing direct care to students. A minority of her time is spend on administrative tasks such as making referrals, meeting with teachers, returning parent phone calls, meeting with parents, and working with the Student Assistance Program which logs counseling activity with respect to students. She normally counsels students with needs once or twice. When a student needs more than six to eight sessions, she considers that student to be a candidate for a higher level of care. (N.T. 33-35, 63, 70; District Exhibit E1)

15. Beginning in the school year, Chamberlain did work similar to Wehler's. Chamberlain provided routine day-to-day counseling with students in a similar manner to how Wehler performs her job as a guidance counselor. Chamberlain performed bargaining unit work

including meeting with students on the issues of organizational skills (including helping them organize lockers, paper and folders) and meeting with students about missing assignments not being completed. Chamberlain's work also included a therapeutic and mental health component and providing academic counseling as part of her therapeutic efforts. Chamberlain did not do any career counseling, data review meetings, child task study meetings, or IEP meetings. (N.T. 35-36, 51, 64, 77, 79, 81).

16. At the middle school, school counselors do not provide mental health therapy or long-term counseling (i.e., more than three to six sessions). At the middle school, school counselors provide intervention at a core, or tier one, level. Tier Two level of intervention is performed by Chamberlain. At this level, Chamberlain sees students more intensely than at tier one and adds a therapeutic level that is not available through school counseling. At Tier 3, the student would be moved up to a referral to the school's Student Assistance Program and considered for outpatient mental health counseling at the Dickenson Mental Health Center. (N.T. 50-51, 65-66, 70-71; District Exhibit E1).

17. The Contract between Gen-Clear and the District for Chamberlain's employment for the 2018-2019 school year (executed in June 2017) states that the services Chamberlain will provide are: "Individual and group counseling services, design and implement coping strategies and support to identified students for the purpose of lessening the impact of social and emotional factors affecting educational progress." (Association Exhibit 4).

18. On September 25, 2018, the Association sent a letter to Dr. Brian Toth, District Superintendent, alerting the District that the Association believed the District may be outsourcing bargaining unit work through the placement of Chamberlain at the Middle School. (Association Exhibit 6).

19. On October 1, 2018, Toth responded to the Association and stated in relevant part:

I am in receipt of your letter of September 25, 2018 regarding the outsourcing of the Middle School Guidance counselor position through Cen-Clear Child Services. The contract that you are referring to clearly states that Leah Chamberlain's role is that of a mental health professional and not a school counselor.

When an errant letter went out to staff by Mrs. Petrosky, I told her that she must keep the school counselor and mental health roles separate. As a result, in order to keep the roles of a school counselor and mental health professional separate, the Middle School has been using the items in the job description for Middle School counselor to make sure the positions are not similar. . . .

We have had, and still have, similar contracted positions at the High School.

(Association Exhibit 7).

DISCUSSION

The Association claims that the District violated Section 1201(a)(5) of the Act when the District hired a third party provider to perform bargaining unit work after one middle school guidance counselor retired at the end of the 2017-2018 school year.

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 analysis for removal of bargaining unit work is a refined and focused factual inquiry into whether the public employer transferred any unit work to non-members without first bargaining with the unit. See City of Harrisburg v. PLRB, 605 A.2d 440, 442 (Pa. Cmwlth. 1992) (holding that a public employer commits an unfair labor practice when it unilaterally transfers any unit work). To determine whether an employer committed an unfair labor practice by unilaterally removing work from a bargaining unit, the Board focuses on the circumstances at the time of the unilateral transfer of work. City of Allentown v. PLRB, 851 A.2d 988, 990 (Pa. Commw. Ct. 2004). 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 matter, the following is clear from the record: Hansloven went on leave towards the end of the 2017-2018 school year. At that time, Petrosky initially brought in Chamberlain through Gen-Clear to help support what she, as Principal, defined as a need for mental health and therapeutic services. Petrosky had identified this need as existing before Hansloven ever left. Petrosky modeled the use of a third-party provider on the situation in the High School. Hansloven then retired and the District did not fill her position. The District did hire Chamberlain back (through Gen-Clear) to continue to provide therapeutic and mental-health services at the school. The District acted unilaterally when it contracted with Gen-Clear and placed Chamberlain in the middle school. Discussion among the parties on the issue occurred after the unilateral act. A handbook at the beginning of the 2018-2019 school year lists Chamberlain as a guidance counselor. Petrosky wrote a letter to staff saying Chamberlain would be taking the place of Hansloven, but either Petrosky was in error when she wrote that or she was informed by the Superintendent that Chamberlain could not perform the duties of a guidance counselor.

The testimony that Chamberlain performed any bargaining unit work in 2018-2019 is conflicting. On the one hand, Petrosky testified that she reviewed a comprehensive log of Chamberlain's work and did not find that Chamberlain performed any guidance counselor duties. (N.T. 79-80). Petrosky did admit that Chamberlain provides academic counseling as part of her therapeutic work, which would appear to overlap with guidance counselor duties. However, the record in this matter does not support a conclusion that academic counseling was exclusive bargaining unit work prior to the 2018-2019 school year.

On the other hand, Wehler, the guidance counselor who worked in the school with Chamberlain, credibly testified that she observed Chamberlain provide routine day-to-day counseling with students in a similar manner to how Wehler performs her job as a guidance counselor. Wehler also observed Chamberlain performing bargaining unit work including meeting with students on the issues of organizational skills (including helping them organize lockers, paper and folders). Wehler also observed teachers asking Chamberlain to meet with students about missing assignments not being completed.¹

Based on the record as a whole, including the witnesses' demeanor on the stand, I credit Wehler's testimony over Petrosky's on the issue of whether Chamberlain was performing bargaining unit work. I infer from the record that while Petrosky and the District may have initially intended that Chamberlain only perform therapeutic or long-term mental health work, nevertheless confusion about her role at the middle school and the need for guidance counselor services in a school of 500 students lead to Chamberlain performing guidance counselor work as needed in the school.

Based on this record I find that long-term (more than 3-6 meetings) therapeutic and mental health work done by Chamberlain is not exclusive bargaining unit work. I also find that the work of guidance counselor in the District is exclusive bargaining unit work. Therefore, to the extent Chamberlain has been performing guidance counselor duties (such as routine one on one meetings with students, meeting with students to help them on organizational issues, and following up on missing assignments) and to the extent the District had identified her as a guidance counselor (as in letters and handbooks), the District has committed unfair practices in violation of Section 1201(a) (5) of the Act.

CONCLUSIONS

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

1. The District is a public employer within the meaning of Section 301(1) of PERA.
2. The Association 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.

¹ On N.T. 68, Petrosky says that "Leah Chamberlain is usually doing intervention because tier one is core." I find that Petrosky misspoke here and meant to say Wehler, not Chamberlain, and she corrects herself on N.T. 69.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering, 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 an employee representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action:

(a) Return the guidance counselor work to the bargaining unit;

(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 the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(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 Association.

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 at Harrisburg, Pennsylvania, this third day of October, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it complied with the Proposed Decision and Order as directed therein; that it has returned the guidance counselor work to the bargaining unit; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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