

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STATE COLLEGE AND UNIVERSITY PROFESSIONAL :
ASSOCIATION, PSEA/NEA :
v. : Case No. PERA-C-18-119-E
STATE SYSTEM OF HIGHER EDUCATION, CHEYNEY :
UNIVERSITY :

PROPOSED DECISION AND ORDER

On May 24, 2018, the State College and University Professional Association, PSEA/NEA (SCUPA or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Pennsylvania State System of Higher Education (PASSHE), alleging that PASSHE violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act) by unilaterally removing bargaining unit work at Cheyney University on or about January 31, 2018.

On June 18, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on September 7, 2018, if necessary. After two continuances, the hearing ensued on February 19, 2019, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed a post-hearing brief on April 30, 2019. PASSHE filed a post hearing brief on May 1, 2019.

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. PASSHE is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)
2. SCUPA is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. SCUPA is the certified bargaining representative for certain professional administrators employed by PASSHE at all 14 of its universities, including Cheyney. (N.T. 9-10; Employer Exhibit 1)
4. SCUPA and PASSHE are parties to a collective bargaining agreement (CBA) effective July 1, 2016 to June 30, 2019. (Employer Exhibit 1)
5. Article 38 of the CBA, which is entitled "Contracting Out Bargaining Unit Work," provides, in relevant part as follows:

Section 1

Effective July 1, 2006, the provisions of this Article shall apply to bargaining unit work performed by professional employees in this unit at the particular University affected.

Section 2

Prior to the award of any outside contract to undertake work within the scope of the work specified in Section 1 above, the University or PASSHE, if a System-wide contract, shall notify in writing the President of SCUPA with a copy to the local SCUPA representative.

Such written notice shall state the length, purpose, rationale, and estimated cost of the intended contract.

For contracts in excess of \$10,000, SCUPA shall be allotted thirty (30) calendar days from the date of notice set forth... above, in which to comment and/or meet and discuss with University or PASSHE management, as appropriate, with respect to a particular contract. At such time, SCUPA may request, and the University shall provide cost information with respect to the contract in question. Time limits may be extended or reduced by mutual agreement as circumstances dictate.

After notification, should SCUPA request to meet and discuss on a particular contract for the purpose of exploring alternatives to the proposed contract, the union must provide specific information on how the work can be accomplished with existing personnel and provide for a reasonable cost savings or improved delivery of service.

Section 3

It is recognized that in situations that present an immediate affect on the health, safety and welfare of students and staff, it may not be possible to follow the procedures outlined above. In such instances the University shall within 48 hours of the occurrence, notify the local SCUPA representative of the existence of the situation and the contract.

Section 4

The Employer agrees not to contract out bargaining unit work which would result in the layoff or downgrading of an employee or prevent an available qualified employee from being recalled to work except for legitimate operational reasons resulting in reasonable cost savings or improved delivery of service...

Section 6

In the event there is no common understanding reached during the meet and discuss, the contract may be implemented. SCUPA may within 15 calendar days of the meet and discuss referenced above submit a grievance to arbitration. The parties shall by mutual agreement select three persons to serve as arbitrators to hear disputes arising from this Article. A case shall be assigned to one of the arbitrators on a rotational basis. The initial order of rotation shall be alphabetical based upon the last name of the arbitrators selected. If the parties can (sic) not agree on the selection of the three arbitrators, either party may, for each grievance, request the Bureau of Mediation to submit a statewide list of seven possible arbitrators for selection in accordance with the procedure outlined in the grievance procedure. The arbitrator shall render a binding decision.

Section 7

The Employer and SCUPA acknowledge the above represents the results of negotiations conducted under and in accordance with [PERA] and constitutes the full and complete understanding regarding the issue of contracting out bargaining unit work.

(Employer Exhibit 1)

6. Gregory Benjamin has been employed at Cheyney University for approximately ten years. His current position is Assistant Director of Admissions, wherein he recruits students for the upcoming semester at the University. Previously, he worked as the Director of Alumni Relations from the time he was hired until he was fired in July 2017. (N.T. 24-26, 79)

7. SCUPA filed a grievance challenging the termination, which the parties settled prior to arbitration in March 2018. Pursuant to the settlement agreement, Benjamin was reinstated with back pay into the Assistant Director of Admissions position at Cheyney, which was different than his prior job. (N.T. 16-17, 56, 80)

8. As Director of Alumni Relations, Benjamin was a member of the bargaining unit and was responsible for implementing, enhancing, overseeing, and coordinating a comprehensive program to meet the needs of alumni and assist the University in realizing its mission and goals. He reported to the Vice President of Advancement and was also responsible for recommending steps necessary to evaluate, enhance or replace existing programs, as well as initiating new programs to meet objectives of developing strong and enduring ties with alumni. (N.T. 15-16; Association Exhibit 5)

9. Specifically, Benjamin performed the following job duties consistent with his position description:

Provide overall leadership, consistent with the strategic direction of [Institutional Advancement], in the development and implementation of alumni programs designed to engage Cheyney alumni in the mission, goals and programs of the University and to encourage financial support of the institution;

Work independently or collaborate with other [Institutional Advancement] and University staff to coordinate activities for the alumni relations programs at the University...;

Develop individualized Alumni recognition programs and activities;

Make recommendations on policies regarding alumni giving, advocacy and mobilization to the Vice President of [Institutional Advancement];

Oversee strategies surrounding communication to alumni; growth of chapters and programs offered to alumni; and partnerships between the Office of Alumni Relations, the National Alumni Association, and various on-campus constituencies;

Develop and oversee the Alumni Relations budget;

Expand, update and manage alumni database to increase overall alumni giving and meet established fundraising goals and targets; ensure that records are updated. Chronicle the accomplishments of alumni and their families, career changes, marriages, births, and death notices, etc.;

Supervise and coordinate alumni cultivation activities such as the President's reception to honor the 50th anniversary class and other reunion activities;

Work effectively within the environment of distributed leadership as a University employee who is committed to developing and attracting funds through long term relationships with University alumni;

Collaborate with [Public Relations] to develop marketing collateral, e.g., brochures, programs, invitations, scripts, bios for introductions, and letters to brand a high functioning Alumni Affairs department; Market new and existing programs to alumni and families, e.g. Naming programs and matching gifts;

Plan and coordinate on and off campus events and assist other staff to cultivate and develop local and regional opportunities suitable for Presidential involvement in alumni events;

Maintain the Alumni Relations web presence; Research and connect positively with Cheyney alumni via social networking websites;

Stays current on best-practices in alumni affairs within the professional realm of University Advancement. Establishes a presence for Cheyney University in national professional associations.

(N.T. 26; Association Exhibit 5)

10. By memorandum dated January 31, 2018, Cheyney University President Aaron Walton indicated the following, in relevant part, to the school's alumni:

I pray that this correspondence finds each of you looking forward to a prosperous and productive 2018. As you might suspect, we here at your alma mater are tirelessly working on your behalf, and those of the students. We are initiating needed changes to prepare Cheyney University to meet the day to day challenges we face in our continuing effort to position the university to take full advantage of emerging opportunities.

As you are aware, Alumni play a critical part in the success of any educational institution, and even more so in the life of Cheyney University. While my plan is to continue making periodic personal visits to the various alumni chapters, I am aware that some issues impacting Alumni require more immediate communications with me and my management team.

In recognition of some needed process and procedural changes needed at Cheyney University, I wanted to provide Alumni with a mechanism for more effective and timely access. Therefore, I am pleased to announce that effective immediately, Mr. Theodore

Duncan (class of 1970) has been appointed as the official Alumni Executive liaison to the president of Cheyney University. This process improvement will allow Alumni related issues to be prioritized, coordinated and addressed on a more immediate and timely basis.

Please join me in thanking, and congratulating Ted in taking on this important role.

The following is Mr. Duncan's Contact Information...

tduncan@cheyney.edu...

(Association Exhibit 6)

11. Prior to Duncan becoming the Alumni Executive liaison to the president, alumni contact was directed to Benjamin, as the Director of Alumni Affairs. (N.T. 63)

12. The Alumni Executive liaison to the president position, which was occupied by Duncan, was not part of the SCUPA bargaining unit. (N.T. 17)

13. Neither PASSHE nor Cheyney University negotiated the transfer of bargaining unit work from the Director of Alumni Relations, a SCUPA bargaining unit position, to non-bargaining unit personnel. (N.T. 18)

14. After his appointment as Alumni Executive liaison to the president, Duncan performed the job duties of the previous Director of Alumni Relations, including coordinating functions with different chapters of the National Alumni Association, attending the National Alumni Association meetings, coordinating Homecoming Alumni Weekend, May Weekend, as well as the 50th anniversary for the class of 1967 or 1968. (N.T. 28-29)

15. As Director of Alumni Relations, Benjamin's duties included accompanying the University President when he or she would travel to Alumni Association meetings. (N.T. 62)

16. Walton conceded during his testimony that Duncan accompanied him to an Alumni Association meeting on at least one occasion when Duncan was serving as the Alumni Executive liaison to the president. (N.T. 74)

17. Duncan took over direct contact with University alumni, and became, as Walton testified, the person who would "get information back to [alumni] from me more quickly than I perhaps was able to do that...If I needed something done, I would ask him to do it." (N.T. 75)

18. In March 2018, Walton appointed Duncan to the newly created position of Director, New Business Development, which was a managerial position not part of the SCUPA bargaining unit. (N.T. 104-105; Association Exhibit 16)

19. Walton acknowledged that the position description for the Director, New Business Development includes the responsibility for "establishing and maintaining high departmental standards for integrity of relationships with all Cheyney University stakeholders," which includes alumni. (N.T. 108; Association Exhibit 17)

20. As Director of Alumni Relations, Benjamin was responsible for creating, expanding, and maintaining an alumni database that included collecting contact information and other data on individual alumni. As part of those job duties, Benjamin created an "Alumni Update Form" to keep track of alumni. When completed, the forms were sent to and handled by the Director of Alumni Relations. The forms are still in use by the University and appear on the University website. (N.T. 33-34; Association Exhibit 7)

21. As Director of Alumni Relations, Benjamin was also responsible for oversight of the Alumni Spotlight Award to recognize Cheyney University alumni, who had reached a notable milestone or other accomplishment. The Spotlight Awards Criteria form, which is still posted on the website, provides that the program will be administered through the Office of the President and directs recommendations for the award to the Director of Alumni Relations. (N.T. 35-37; Association Exhibit 9)

22. As Director of Alumni Relations, Benjamin played a prominent role in the planning, selection, and coordination of an annual 50th year reunion and recognition ceremony for a Cheyney Alumnus of distinction. Benjamin focused on selecting an honoree who would be willing and able to make a financial contribution to the University. (N.T. 40-41; Association Exhibit 11)

23. Cheyney University continues to select and honor a 50th year alumnus. (N.T. 41-42; Association Exhibit 12)

24. At all relevant times to these proceedings, there has been a Cheyney University Foundation, which is an independent entity affiliated with the University that performed fundraising for the University. (N.T. 53-54)

25. As Director of Alumni Relations, Benjamin was also significantly engaged in fundraising activities from alumni. Walton testified that six or eight months prior to the hearing in this matter (June to September 2018), "we have made the Foundation the development arm for the university as part of their MOU...We updated the MOU." (N.T. 82)

26. Walton acknowledged that the Director of Alumni Relations had a significant presence in dealing with alumni organizations, and now the Foundation is to have that direct presence with alumni organizations, in addition to himself, as President. (N.T. 82)

27. Walton testified that the job function of the Director of Alumni Relations to expand, update, and manage the alumni database to increase overall alumni giving and meet established fundraising goals is now being performed by the Foundation. (N.T. 97)

28. As Director of Alumni Relations, Benjamin was responsible for overseeing strategies surrounding communication with alumni. (N.T. 92; Association Exhibit 5)

29. The University has developed a Strategic Plan since Walton assumed his duties. The Strategic Plan includes a current objective to "evaluate and strengthen Alumni communication." (N.T. 89; Association Exhibit 14)

30. Walton testified that the Foundation will be responsible for evaluating and strengthening alumni communication under the plan. (N.T. 91)

31. Walton testified that, as president, he is the University employe with primary, if not sole, responsibility for alumni relations outside of the fundraising that is performed by the Foundation. Walton testified that he is responsible for alumni communications. (N.T. 82-84, 94)

32. Walton testified that the former functions of the Director of Alumni Relations with regard to the 50th anniversary class recognition are now personally performed by him: "the coordination of the event would happen through my office, if it involves me, and that's where it would rest." (N.T. 99)

DISCUSSION

SCUPA has alleged that PASSHE, and specifically Cheyney University, violated Section 1201(a) (1) and (5) of the Act¹ by unilaterally removing work previously done by the Director of Alumni Affairs from the bargaining unit and assigning the work to non-bargaining unit personnel. PASSHE contends that the charge should be dismissed because it is untimely, and the record does not support any removal of bargaining unit work. PASSHE also submits that, even if the record shows that bargaining unit work was unilaterally removed, the charge should nevertheless be dismissed because PASSHE was contractually privileged to do so.

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 employe 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 employes, 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 employes and non-bargaining 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).

¹ Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(5) Refusing to bargain collectively in good faith with an employe 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. 43 P.S. § 1101.1201.

In this case, SCUPA has sustained its burden of proving a violation of the Act. Indeed, the record shows that Cheyney University, while attempting to eliminate the Director of Alumni Affairs position, unilaterally removed the work previously performed by Benjamin and assigned the work to non-bargaining unit personnel, i.e., Duncan, the Cheyney Foundation, and Walton himself. And, insofar as the work was previously shared by the bargaining unit and non-bargaining unit personnel, the record shows that Cheyney University altered the extent to which it was shared. As the Union persuasively notes, SCUPA had developed an expectation in having a full-time bargaining unit position dedicated to alumni relations work, which Cheyney has altered, as now the work is being done by non-bargaining unit personnel only. Furthermore, PASSHE's timeliness argument must be rejected, as the record shows that SCUPA did not receive notice of the removal of bargaining unit work until Walton's January 31, 2018 Memorandum to the alumni. (N.T. 27; Association Exhibit 6). As a result, SCUPA filed the May 24, 2018 charge of unfair practices within the four-month limitations period.²

PASSHE's contractual privilege argument is similarly unavailing. The Board has adopted the sound arguable basis or contractual privilege defense to a claimed refusal to bargain, which calls for the dismissal of a charge when the employer establishes a sound arguable basis in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible, i.e. contractually privileged under the terms of that agreement. Temple University Hospital Nurses Ass'n et. al. v. Temple University Health System, 41 PPER ¶ 3 (Final Order, 2010). Where the employer asserts a contractual right to change a mandatory subject of bargaining, it must point to specific, agreed-upon contract language which arguably indicates the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. *Id.* citing Port Authority Transit Police Ass'n v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008). However, a repudiation or alteration of the terms of the collective bargaining agreement is an unfair labor practice. Wilkes-Barre Twp. Police Benevolent Ass'n v. Wilkes-Barre Twp., 35 PPER 137 (Final Order, 2004) *aff'd sub. nom. Wilkes-Barre Twp. v. PLRB*, 878 A.2d 977 (Pa. Cmwlth. 2005). And, even if the employer has a sound arguable basis for ascribing a particular meaning to the language of an applicable collective bargaining agreement, the contractual privilege defense fails if the employer does not also act in accordance with that construction of the collective bargaining agreement. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections (Quehanna SCI), 35 PPER 28 (Proposed Decision and Order, 2004).

In the instant matter, PASSHE relies on Article 38, Section 4 of the CBA, which provides that:

The Employer agrees not to contract out bargaining unit work which would result in the layoff or downgrading of an employee or prevent an available qualified employee from being recalled to work except for legitimate operational reasons resulting in reasonable cost savings or improved delivery of service...

² Section 1505 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements that were made more than four months prior to the filing of the charge." 43 P.S. § 1101.1505.

Likewise, PASSHE points to Walton's testimony that Cheyney was facing significant financial challenges that necessitated a reduction in force which included the elimination of the entire division, in which the former Director of Alumni Relations position existed, the University Advancement and External Relations Division. (N.T. 55). To that end, Walton indicated that, as part of an effort to dramatically reduce the school's budget, he eliminated approximately 30 to 32 positions. (N.T. 109).

However, the record shows that neither PASSHE nor Cheyney University even arguably complied with the remaining provisions of Article 38 of the CBA, which unequivocally requires written notification to SCUPA, stating the length, purpose, rationale, and estimated cost of any intended contract for removal of bargaining unit work, as well as a meet and discuss session for contracts in excess of \$10,000. (Employer Exhibit 1). SCUPA's Uniserv representative, Carolyn Funkhouser, testified credibly that the University never provided written notice to SCUPA regarding the proposed outsourcing of bargaining unit work. (N.T. 116-117). As such, the contractual privilege defense must fail as a matter of law, and PASSHE will be found in violation of its bargaining obligation under Section 1201(a)(1) and (5) of the Act.

CONCLUSIONS

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

1. PASSHE is a public employer within the meaning of Section 301(1) of PERA.
2. SCUPA is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. PASSHE 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 PASSHE 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 alumni relations work to the bargaining unit, restore the status quo ante, and make whole any bargaining unit

employees who have been adversely affected due to PASSHE'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 employees, 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 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 19th day of July, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STATE COLLEGE AND UNIVERSITY PROFESSIONAL :
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AFFIDAVIT OF COMPLIANCE

PASSHE, Cheyney University 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 alumni relations work to the bargaining unit, restoring the status quo ante, and making whole any bargaining unit employes who have been adversely affected due to PASSHE'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

