

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EAST STROUDSBURG AREA EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION¹ :
 :
v. : Case No. PERA-C-22-134-E
 :
EAST STROUDSBURG AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On May 17, 2022, the East Stroudsburg Area Educational Support Personnel Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the East Stroudsburg Area School District (District), alleging that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act) by unilaterally removing Rebecca Lopez from the bargaining unit on January 24, 2022 and designating her position as confidential without filing a unit clarification petition with the Board. The Association further alleged that the District violated Section 1201(a)(1) and (5) of the Act by unilaterally removing bargaining unit work on January 24, 2022 when Lopez began performing the unit's work in her non-unit position and by ceasing to provide pay and benefits to Lopez consistent with the collective bargaining agreement.

On June 10, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation and directing a hearing on August 22, 2022, if necessary. The hearing was continued to October 26, 2022, at the Association's request and without objection by the District. The hearing ensued on October 26, 2022, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed post-hearing briefs in support of their respective positions on February 24, 2023.

The Hearing 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. 6)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. The Association is the certified bargaining representative for a unit of nonprofessional employes at the District. (Joint Exhibit 1)
4. The Association and the District are parties to a collective bargaining agreement (CBA) effective July 1, 2017 to June 30, 2022. (Joint Exhibit 2)

¹ The caption appears as amended by the hearing examiner, consistent with the Board's October 17, 1995 Nisi Order of Certification. (PERA-R-95-417-E).

5. The CBA governs the pay and working conditions for employees classified as Business Office Personnel I (BOP I) and Business Office Personnel II (BOP II), which include positions such as payroll clerks, tax collectors, and accounts payable bookkeepers. (N.T. 22-23; Joint Exhibit 2)

6. Prior to January 24, 2022, Rebecca Lopez was employed at the District as a Registration Secretary and worked at the District's Administrative Services building. She was a member of the bargaining unit and paid as a BOP I at the contractual rate of \$18.92 an hour. She was initially hired as a facilities secretary in the bargaining unit approximately six or seven years ago before moving to the Registration Secretary position in 2020. (N.T. 25-33, 37-38, 62; Association Exhibit 1)

7. On January 24, 2022, the District's School Board held a meeting, during which the School Board accepted Lopez's resignation from her position as Registration Secretary (BOP I) and then appointed her to the newly created position of Administrative Assistant, which pays \$21.00 an hour. (N.T. 30-33; Association Exhibit 1)

8. The rate of \$21.00 an hour is not consistent with the wages set forth for BOP employees in the CBA. (N.T. 32-33; Joint Exhibit 2)

9. The District did not bargain with the Association over the pay increase for Lopez or the designation of her Administrative Assistant position outside the bargaining unit. (N.T. 33-34)

10. The District has not filed a petition for unit clarification with the Board to remove the Administrative Assistant position, which Lopez currently holds, from the unit. (N.T. 17, 34)

11. Since January 24, 2022, Lopez has continued working in the District's Administrative Services building, handling requisition forms and purchase orders, which are documents used to purchase goods or services on behalf of the District. (N.T. 34-35, 62-64)

12. John Rosado has worked at the District for 17 years, including eight or nine years at the Business Office in the Administrative Services building as an accounts payable employee. He serves as Treasurer and a member of the Association's bargaining team. He testified that Lopez handled purchase orders as part of her previous duties as Facilities Secretary. (N.T. 18-20, 38)

13. On cross-examination, Rosado admitted that non-bargaining unit employees also handle requisitions and purchase orders. (N.T. 41-42)

14. On redirect examination, Rosado testified that confidential employees classified as administrative assistants handle requisitions and purchase orders in offices where there are no bargaining unit support staff employees. He also explained that Jessie Lohman, who is a bargaining unit employee and who used to handle requisitions and purchase orders in the business office, no longer performs those duties, despite still being located in the business office. (N.T. 52-53)

15. In support of its position, the District offered the testimony of Eric Forsyth, who has been the Director of Communications and Operations for the District for approximately one year. He has been employed with the

District for 31 years and previously served as the Director of Administrative Services. (N.T. 77-78)

16. Forsyth oversees the operational aspects of the District and is the direct supervisor of Lopez in her new position as Administrative Assistant. He also oversees the office of child accounting, environmental services, facilities, maintenance, and pupil transportation. (N.T. 79)

17. Forsyth testified that, at some point, the District's School Board identified a need for greater outreach to the public for information and communications. As a result, the School Board retitled his prior position and created a new Administrative Assistant position directly under the Director of Communications and Operations, which involved a lot more duties than the District had previously performed related to media marketing and the press, and which the District deemed confidential. (N.T. 79-80)

18. Forsyth testified that the District interviewed candidates for the new Administrative Assistant position, which was awarded to Lopez due to her bachelor's degree in communications and her excellent fit within the department. (N.T. 80)

19. Forsyth testified that, aside from Lopez who reports directly to him, he also has a secretary that specializes in records management within the student records room, who is a member of the bargaining unit. He explained that all of the other departments he oversees have directors or supervisors who report to him. (N.T. 80-81)

20. Forsyth testified that, on January 27, 2022, the District posted a vacancy announcement for the BOP I bargaining unit position, which was created when Lopez resigned on January 24, 2022. The vacancy announcement advertised a rate of \$18.67 an hour, which was consistent with the CBA. He indicated that the District filled the opening by hiring Samantha Hardy on February 28, 2022. (N.T. 82-84; Joint Exhibit 2; District Exhibit 1)

21. Forsyth testified that Lopez resigned from her position in the bargaining unit on January 24, 2022. He stated that the District did not remove her BOP I position from the bargaining unit, nor did the District make any changes to the BOP I position. Instead, he indicated that the District immediately advertised for the position, interviewed for it, and eventually filled it. He described how Lopez was appointed to the new Administrative Assistant position on January 24, 2022 at the rate of \$21.00 an hour, which was the starting rate for a confidential secretary's package. (N.T. 83-85)

22. Forsyth testified that, as an Administrative Assistant, Lopez is responsible for ordering items that his office needs and processing requisitions or payments that come to him from a subordinate director or supervisor, who does not have support staff available for assistance. He stated that these job duties are performed by other employees outside of the bargaining unit, as necessary. (N.T. 87-88)

23. Forsyth testified that, as an Administrative Assistant, Lopez is responsible for performing the following job duties:

Assist with communications, including answering phones, responding to messages, receiving visitors, preparing documents and reports, maintaining files, faxing and processing mail and correspondence;

Assist with public information communications, scheduling interviews, distributing press releases, sending mass communications, and managing social media accounts;
Assist with the management of select [D]istrict website content;
Assist with preparation, organizing and maintenance of contract negotiations, employe discipline and grievance documents;
Assist with the administration of the [D]istrict Federal Title IX compliance program by organizing, tracking and maintaining records of associated harassment/discrimination complaints and their resolutions;
Assist with the preparation, tracking and maintenance of student expulsion hearings and associated documents;
Assist with the administration and tracking of requests for records in accordance with the Right-to-Know law and any associated appeals;
Administer the [D]istrict's Education Names and Addresses (EdNA) database;
Administer the ePDE web portal;
Assist with administration and preparation of various operating budgets under the authority of the department;
Organize, prepare and maintain requisitions;
Prepare and submit state reports as assigned;
Assist with any special projects assigned to the department;
Perform other duties as assigned by the Director of Communications and Operations.

(N.T. 89-90, 93; District Exhibit 2)

DISCUSSION

The Association argues that the District violated Section 1201(a)(1) and (5) of the Act² by unilaterally designating Lopez's new position as a non-unit confidential position, by removing bargaining unit work, and by paying her inconsistent with the CBA. The District, for its part, contends that the charge should be dismissed because the Association did not sustain its burden of proving a removal of bargaining unit work. The District also submits that the charge should be dismissed because the record shows that it did not remove the Registration Secretary position from the bargaining unit, but rather that the District created a new position of Administrative Assistant, which it filled with Lopez. The District asserts that there could not have been a removal of any unit work because it then subsequently filled the vacancy for the Registration Secretary position with Samantha Hardy, who remains a bargaining unit employe.

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

² 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.

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).

A removal of bargaining unit work may take one of two forms: (1) an unfair practice occurs when an employer unilaterally removes work that is exclusively performed by the bargaining unit without prior bargaining with the union; and (2) an employer also commits an unfair practice when it alters a past practice related to the assignment of bargaining unit work to non-unit members or varies the extent to which members and non-members of the unit performed the same work. Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011). Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006). 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 Association has sustained its burden of proving that the District violated the Act by unilaterally removing bargaining unit work. During the hearing, the Association offered the testimony of its Treasurer John Rosado, who testified that since January 24, 2022, Lopez has continued working in the District's Administrative Services building as a non-unit Administrative Assistant, handling requisition forms and purchase orders, which she previously performed in her bargaining unit role as a facilities secretary, and which Jessie Lohmann also performed in her role as a bookkeeper 2 position in the bargaining unit. (N.T. 38-40, 53).³ Rosado readily conceded that non-bargaining unit employes also handle requisitions and purchase orders. But Rosado also testified credibly on redirect examination that confidential employes classified as administrative assistants handle requisitions and purchase orders only in offices where there are no support staff employes, i.e. bargaining unit members. Thus, the Association has satisfied the exclusivity requirement by demonstrating that bargaining unit employes performed an identifiable proportion or quantum of the shared requisition and purchase order duties in this regard. Indeed, the record shows that Lopez continues to work in the Administrative Services building where bargaining unit employes, who used to perform requisition and

³ While the Association did not specifically allege a unilateral removal of the Facilities Secretary duties, the charge can be fairly read to include an averment that the unit's work includes the job duties of the business office personnel, which is where Lohmann works, and which was unilaterally removed from the unit. (N.T. 38-40, 53). Therefore, the District had adequate notice to defend this portion of the charge.

purchase order duties, also work, and no longer perform these job functions. What is more, Forsyth himself admitted that, aside from Lopez who reports directly to him, he also has a secretary that specializes in records management, who is a member of the bargaining unit. Therefore, the record establishes that the District has a bargaining unit employe in Forsyth's office, who is available to handle the requisition and purchase order work. As such, the Association has clearly demonstrated that it has developed an expectation or interest in retaining the requisition and purchase order duties in offices where there are bargaining unit employes stationed or working. Accordingly, the District violated the Act by altering the extent to which bargaining unit and non-unit personnel shared the requisition and purchase order duties.⁴

The Association also maintains in its post-hearing brief that the District violated the Act by unilaterally removing bargaining unit work, which Lopez now performs in her role as an Administrative Assistant, including maintaining the webpage, handling maintenance invoices, registration for conferences, student expulsion hearings, assisting with Title IX compliance, tracking Right-to-Know requests, administering the ePDE web portal, and assisting with communications, such as answering phones, responding to messages on behalf of the administration, and receiving visitors. (See Association brief at p. 4-5, 10-11). However, the Association did not present any evidence whatsoever that the bargaining unit employes performed these alleged job duties exclusively, nor did the Association offer any evidence regarding the extent to which unit and non-unit personnel shared these alleged functions. As a result, this portion of the charge must be dismissed.

In any event, even if the Association did show that maintaining the webpage was exclusive to the unit employes, the record shows that those duties are performed by the District's Information Technology (IT) employes. Unfortunately for the Association, the removal of these duties was not raised in the charge. Instead, the Association specifically alleged in the specification of charges that the District unilaterally removed the BOP

⁴ On recross examination, the following exchange between District counsel and Rosado occurred:

Q. John [Rosado], you cannot - you could not disagree if I were to tell you that the HR department has a Secretary that's in the bargaining unit and who still does requisitions. You could not -

A. She was hired -.

Q. You could not disagree with that, could you?

A. I cannot.

Q. Thank you.

(N.T. 54). This exchange simply does not constitute substantial competent evidence that the District has a human resources department, which has a bargaining unit secretary, along with another non-unit employe, who handles requisitions and/or purchase orders, so as to discredit or impeach Rosado's testimony establishing that bargaining unit employes performed an identifiable proportion or quantum of the shared requisition and purchase order duties.

duties from the bargaining unit on January 24, 2022. (See Specification of Charges at paragraphs 6, 7 & 9). The Association did not even allege that the IT duties were bargaining unit work, let alone the unilateral removal of those duties from the unit. To the contrary, the specification of charges is completely devoid of any averments relative to the IT employees or job duties. In fact, the specification of charges is expressly limited to an alleged removal of the BOP job duties. And, there is no evidence that the IT employees work in the business office or are classified as BOP employees.

Recently, in Chichester Education Ass'n v. Chichester School District, PERA-C-21-279-E (Order Directing Remand to Hearing Examiner for Further Proceedings, 2023), the Board reiterated its longstanding rule and opined as follows:

...Section 95.31(b) (3) of the Board's Rules and Regulations provides that charges filed with the Board shall include "[a] clear and concise statement of the facts constituting the alleged unfair practice, including the names of the individuals involved in the alleged unfair practice...and nature of each particular act alleged..." 34 Pa. Code § 95.31(b) (3). The Board has consistently held that the charging party must put the responding party on notice of the precise nature of the conduct which is at issue in the charge, and is limited to the presentation of evidence as to the specific allegations contained in the charge. Iroquois Education Association PSEA/NEA v. Iroquois School District, 37 PPER 167 (Final Order, 2006); Independent State Store Union v. Commonwealth of Pennsylvania, Liquor Control Board, 22 PPER ¶ 22009 (Final Order, 1990); PLRB v. Lawrence County, 12 PPER ¶ 12312 (Final Order, 1981). Therefore, the Board has jurisdiction only over those unfair practices that are alleged in the charge. *Id.*

In light of this precedent, the Board is therefore without jurisdiction in the instant matter to entertain any averments regarding an alleged removal of the IT employee job duties, as those averments were not raised in the charge. As a result, this portion of the charge must also be dismissed as a matter of law.

The same result does not obtain, however, with regard to the remaining portions of the Association's charge. While the record does not show that the District unilaterally removed the Registration Secretary position from the unit, the record nevertheless demonstrates that the District created a new position of Administrative Assistant, which it unilaterally designated as confidential and excluded from the bargaining unit. The Board has long held 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 as confidential. Beaver County Community College, 23 PPER ¶ 23070 (Final Order, 1992), *aff'd*, 24 PPER ¶ 24110 (Court of Common Pleas of Beaver County, 1992).

Here, the Administrative Assistant position currently held by Lopez clearly fits within the broad unit description for the nonprofessional employees. Similarly, the District stipulated that it has not filed a petition for unit clarification with the Board to remove the Administrative Assistant position from the unit. Furthermore, the District did not bargain with the Association over the pay increase for Lopez or the designation of

her Administrative Assistant position outside the bargaining unit. As such, the District has violated the Act by unilaterally designating the Administrative Assistant position as confidential and excluding that position from the unit. In addition, the District has also violated the Act by ceasing to provide pay and benefits to Lopez consistent with the CBA.⁵

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 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.

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 requisition and purchase order duties and the Administrative Assistant position currently held by Rebecca Lopez to the bargaining unit and provide Lopez the pay (on a prospective basis only), benefits, and working conditions stated in the CBA;
 - (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;

⁵ Of course, the remedy will be limited to prospective relief only with regard to this portion of the charge to the extent that Lopez has been earning more than bargaining unit wages set forth in the CBA since January 24, 2022.

(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 29th day of March, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EAST STROUDSBURG AREA EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION :
v. : Case No. PERA-C-22-134-E
EAST STROUDSBURG AREA SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

East Stroudsburg 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 requisition and purchase order duties and the Administrative Assistant position currently held by Rebecca Lopez to the bargaining unit and by providing Lopez the pay (on a prospective basis only), benefits, and working conditions stated in the CBA; 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