COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| PLEASANT VALLEY EDUCATION SUPPORT PROFESSIONALS ASSOCIATION, PSEA/NEA | : | |
| v. | : | Case No. PERA-C-22-322-E |
| PLEASANT VALLEY SCHOOL DISTRICT | : | |

**PROPOSED DECISION AND ORDER**

On December 8, 2022, the Pleasant Valley Education Support Professionals Association (Association or Union) filed a charge of unfair practices, as amended on May 3, 2023, with the Pennsylvania Labor Relations Board (Board) against the Pleasant Valley School District (District), alleging that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally changing the hourly pay rate for several bargaining unit employes, beginning on September 13, 2022, to rates which are inconsistent with the collective bargaining agreement and failing to provide those bargaining unit employes with benefits, as set forth in the agreement. The Association also alleged that the District violated the Act by negotiating the new pay rates directly with the bargaining unit employes, and not the exclusive bargaining representative. The Association further alleged that the District violated the Act by repudiating the terms of the collective bargaining agreement governing the pay rates and benefits for those bargaining unit employes.

On March 2, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation and directing a hearing on April 5, 2023, if necessary. The hearing was continued multiple times at the request of both parties. On May 12, 2023, the Board Secretary issued an Amended Complaint and Notice of Hearing, directing a hearing on July 17, 2023, if necessary.

The hearing ensued on July 17, 2023, 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 September 29, 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. 11)

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 11)

3. The Association is the certified bargaining representative for a unit of nonprofessional employes at the District. (Joint Exhibit 1, 2)

4. The Association and the District were parties to a collective bargaining agreement (CBA) effective July 1, 2018 to June 30, 2021. (Joint Exhibit 1)

5. The Recognition Clause of the CBA, which is found in Article I, provides, in relevant part, as follows:

> The [School] Board hereby recognizes the Association as the exclusive representative for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment in accordance with the provisions of Act 195 and Act 88 of 1992, for personnel employed by the [School] Board as regular **custodians, maintenance technicians, secretaries, bookkeepers, couriers, paraprofessional associates (PPA), food service employees, monitors, information systems technicians (IS Tech), student information data specialists (SIDS), and health room technicians (HRT)** and excluding management level employees, supervisors, first level supervisors, confidential employees, and guards as defined in the Act.

(Joint Exhibit 1)(Emphasis in original)

6. The CBA provided salary schedules in Appendix A to govern the wage rates for the nonprofessional employes during each year of the contract. For example, the Paraprofessional scale included 21 steps ranging from $24,992 to $37,806 during the 2020-2021 school year. Likewise, the Monitor scale included 15 steps ranging from $10.97 per hour to $13.87 per hour during the 2020-2021 school year. The CBA also covered the pay rates for Administrative and Building Secretaries, which included 21 steps ranging from $32,820 to $54,343 and 20 steps ranging $31,206 to $46,057, respectively, for the 2020-2021 school year. (Joint Exhibit 1)

7. Article VI of the CBA also provided that the District would pay the full cost for the purchase of hospitalization, health, and dental insurance for all full-time bargaining unit employes. Full-time was defined as 35.5 hours or more per week, except for food service employes, who only had to work 30 hours or more per week. (Joint Exhibit 1)

8. Article VII, Section 4 of the CBA, which was entitled "Lay-off/Furlough," provided in relevant part, as follows:

> In the event of a lay-off or furlough, the [School] Board agrees to lay-off or furlough the employee(s) with the least seniority in that particular position/classification. A seniority list for full-time and part-time employees for furlough purposes only, will be maintained in the Human Resources Office.
>
> Recall shall be in the inverse order of seniority within the particular position/classification, that is, the last employee laid-off shall be the first recalled to a vacant or new position within the position/classification.

(Joint Exhibit 1)

9. Article VII, Section 9 of the CBA, which was entitled "Vacancies," further provided as follows:

> Whenever a vacancy arises or is anticipated, the Director of Human Resources shall promptly post notice of same (for no less than ten (10) days before the position is filled) and notify the Association. It is understood that should conditions warrant it, the vacancy may be filled on an interim basis prior to the expiration of the ten (10) day posting period. If an employee is not assigned to fill the vacancy, that employee shall have a right to appeal the refusal to his/her immediate supervisor with final appeal to the Superintendent.
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> The Association agrees that the [School] Board reserves the right to waive the ten (10) day posting period requirement for Paraprofessional Associates if the needs and the exigencies of the School District warrant it, with the understanding that the waiver does not prejudice consideration of applicants for that position. The existing practice of notifying the Association should continue throughout the duration of the contract.

(Joint Exhibit 1)

10. Article VII, Section 11 of the CBA, which was entitled "Probationary Period for New Employees," provided in relevant part, as follows:

> All new employees in the bargaining unit shall serve a probationary period of ninety (90) calendar days, during which they may be summarily dismissed by the School District without challenge. The Association may represent such probationary employees in handling grievances other than those relative to dismissal, but such grievance shall not be subject to arbitration.
>
> The probationary period shall not include time served under part-time, temporary, or emergency or substitute appointments, nor time while the employee is absent from work.

(Joint Exhibit 1)

11. Article VII, Section 20 of the CBA, which was entitled "Additional work time for monitors and paraprofessionals," provided in relevant part, as follows:

> A. When additional monitors and paraprofessionals beyond those regularly employed are needed, the School District shall offer such work to bargaining unit School District employees first before offering the work to a substitute.
> B. When called in for substitute work, the monitors and paras will be paid the contractual rate since the work is identical to work already performed.
> C. When additional work is available for part-time paraprofessionals, it will be offered by building to the individual most suited to meet the needs of the students. In this situation, the assigned a.m. or p.m. paraprofessional will be offered an opportunity to substitute first whenever the other is absent. In addition, if special training and/or skills are required for an assignment, those individuals who possess such training and/or skills will be offered an

opportunity to substitute first. Similarly, certain individuals may be offered an opportunity to substitute first if the principal/designee determines that there is an educational and/or other valid reason. Extended leave will be determined using the above criteria.

D. When additional work is available for part-time monitors, it will be offered by building on a rotating seniority basis. When a substitute is needed for an extended leave, preference will be given by seniority rotation. The most senior employee may accept all or part of the assignment. The remainder will be offered to the next most senior employee and so forth.

E. The established past practice of the School District whereby medical benefits are not afforded to monitors and paraprofessionals who work more than twenty (20) hours per week shall continue, unless provided by law.

(Joint Exhibit 1)

12. The Association and the District entered into a successor CBA on November 3, 2022, effective July 1, 2022 through June 30, 2026. The parties agreed that the higher pay rates for the successor agreement would be applied throughout the entire 2022-2023 school year, despite the November 2022 execution date. (N.T. 30, 146; Joint Exhibit 2)

13. Aside from the salary schedules, most of the CBA provisions set forth above remained largely intact in the successor agreement. However, the parties did replace Article VII, Section 20(B) as follows in Section 7.20 of the new CBA:

> If a part-time paraprofessional substitutes for the half of the day they [sic] do not normally work, the paraprofessional shall be given a ½ hour paid student free break/lunch period.

(Joint Exhibit 2)

14. The successor CBA also provides for salary schedules in Appendix A to govern the wage rates for the nonprofessional employes during each year of the contract. The paraprofessional scale includes 12 steps ranging from $25,617 to $32,800 for the 2022-2023 school year, while the monitor scale includes 12 steps ranging from $11.24 to $13.40 per hour for the 2022-2023 school year. Similarly, the Administrative Secretary and Building Secretary scales both include 12 steps ranging from $33,641 to $42,916 and $31,986 to $39,555, respectively, for the 2022-2023 school year. The successor CBA also provides in Article VI, Section 6.1(c) that "[t]he Employer shall provide, and pay the premium for vision care for eligible Employees and eligible dependents during the term of the Agreement." (Joint Exhibit 2)

15. The District has maintained Policy 305 entitled "Employment of Substitutes and Short-Term Employees" since September 8, 2016, which was last reviewed on December 16, 2019. Policy 305 provides, in relevant part, as follows:

> Qualified and competent substitutes for professional and support employees shall be employed by the [D]istrict in order to provide continuity in the educational programs, operations and services of the schools...

> Substitutes for professional employees shall be paid on a per diem basis at a rate set periodically by the [School] Board...
>
> Substitutes for support employees shall be compensated at a rate set annually by the [School] Board for the various classes of employees.

(Association Exhibit 9)

16. Tammy VanHouwe has been employed at the District for approximately 20 years. She initially started as a Monitor, but she has been a Paraprofessional since 2006. She has also been President of the Association since July 1, 2022. Prior to that, she served as Association Vice President for two years and Membership Chair for one year. (N.T. 142-143)

17. VanHouwe testified that, for the years prior to June 2022, the District used non-bargaining unit substitute employes only to fill in for other employes who were out on leave and expected to return to work. She explained that the District never used non-bargaining unit substitutes to fill vacant or newly created positions that had no other employe assigned. She also described how the District followed the CBA language and posted for open positions within a couple days of when the vacancies arose and did not delay postings for weeks or months. (N.T. 157-159, 163-164, 173)

18. VanHouwe testified that, for the years prior to June 2022, the District did not use non-bargaining unit substitute employes to fill vacant or newly created positions, even while the position was being posted under the CBA. She described how the bargaining unit employes would always just absorb the work and help out while the vacant position was being filled. She explained how the bargaining unit employes would absorb the work and help out even in unforeseen or emergency situations, such as a new special education student transferring into the District. (N.T. 159-161, 164-165, 182)

19. VanHouwe testified that the District furloughed 52 part-time paraprofessional employes in June 2020. She indicated that the District also laid off 11 monitors, 20 paraprofessionals, and three secretaries in June 2022. She described how those employes would all have recall rights under the CBA. (N.T. 150-151; Association Exhibit 8)

20. The District maintains and operates a computer system and portal called AESOP that lists open positions and reports which employes are assigned to positions. When an employe is covering for another absent employe, AESOP will typically list the absent employe and the other employe who is covering the position. If there is only one employe assigned to the position and she is not covering for an absent employe, AESOP will list only the employe's name and classify the position as "open" or "vacant." (N.T. 45-46, 121-122, 125-126, 155-157, 196-197, 223-224; Association Exhibits 1, 2, 3, 4, 5, 6, 7)

21. Kimberly Tinker began working for the District as a paraprofessional in September 2018 until she was furloughed in June 2020. From October 4, 2022 to April 20, 2023, Tinker worked 110 days for the District as a paraprofessional in the same assignment, which was serving as a one to one paraprofessional for a new student with special needs from New York, who had an Individualized Education Plan (IEP). Tinker's AESOP records for this period reflect that she filled a vacant position with no other

employe assigned and that she generally worked full-time hours every day. (N.T. 20-24, 27, 37; Association Exhibit 1)

22. The District did not treat Tinker as a bargaining unit employe and classified her as a substitute instead. Thus, the District did not pay Tinker the contractual salary for this period, but rather paid her the substitute rate of $82.50 per day. The District did not provide Tinker with benefits for this period either. (N.T. 24-25, 31-32; District Exhibit 13, Joint Exhibit 2)

23. In April 2023, Tinker was notified by a learning support teacher that her assignment was ending. This was the only notice she received. During her assignment from October 4, 2022 to April 20, 2023, the District never posted the position under the CBA. (N.T. 35-36; 248)

24. Kelly Chiumento began working for the District as a paraprofessional in October 2013. She was eventually furloughed twice, once in June 2020, and then again in June 2022. (N.T. 47-48)

25. Chiumento returned to the District as a paraprofessional on September 8, 2022 and was assigned to work in a kindergarten classroom at Pleasant Valley Elementary School. From September 8, 2022 to October 6, 2022, she worked full-time. Her AESOP records for this period indicate that she was filling a vacant position with no other employe assigned. (N.T. 49-50, 53-54, 223-224; Association Exhibit 2)

26. The District did not treat Chiumento as a bargaining unit employe for this period and classified her as a substitute instead. Thus, the District did not pay Chiumento the contractual salary for this period, but rather the substitute rate of $82.50 per day. The District did not provide Chiumento with benefits for this period either. (N.T. 50-52; District Exhibit 9, Joint Exhibit 2)

27. After October 6, 2022, the District began treating Chiumento as a bargaining unit employe and paid her the contractual rate with benefits. Chiumento continued working in the same assignment until November 14, 2022. (N.T. 55-57, 220)

28. Chiumento testified that she received her assignment on September 7, 2022 when the Elementary School Principal, Roger Pomposello, called her and indicated that he was going through the furlough list. Pomposello stated on the call that Chiumento was next on the list. (N.T. 61-65)

29. The District's Assistant Business Manager, Tammy Smale, testified that the position held by Chiumento from September 8, 2022 to October 6, 2022 was not posted because Chiumento was recalled from the furlough list. The District's Human Resources Director, Lori Fulmer, likewise confirmed that Chiumento was recalled from the furlough list. Fulmer also acknowledged that the District did not make Chiumento's new classification as a bargaining unit employe retroactive to her first day on September 8, 2022. (N.T. 247-248, 259, 275-276)

30. Joanne Mastronardi began working for the District as a part-time secretary in 2009. She was furloughed in July 2009, but then she returned in September 2009 as a monitor. She was furloughed again in June 2022. (N.T. 67-68)

31. Mastronardi returned to work at the District as a secretary in July 2022. Her AESOP records show that when she initially returned, she covered for several other secretaries who were out on leave. (N.T. 73-75; Association Exhibit 3)

32. On August 1, 2022, the District transferred one of the other secretaries, Shirley Hood, to a different building at the District's offices. The District then assigned Mastronardi to the position previously held by Hood at the District's Elementary School. Mastronardi's AESOP records show that she was the only employe assigned to a vacant position for the period of August 1, 2022 to September 23, 2022, during which she worked full-time hours. (N.T. 75-77, 80, 225, 227-228; Association Exhibit 3)

33. The District's Assistant Business Manager, Tammy Smale, testified that the District had an Administrative Secretary named Holly Tuers, who went off work for a maternity leave in September 2022. Smale explained that Tuers served as Administrative Secretary to the District's Director of Operations. The District then temporarily transferred Sylvia Facella, who was a former Administrative Secretary to the Director of Operations, into the position held by Tuers to ensure smooth coverage. The District then temporarily transferred Shirley Hood, who was at the Elementary School, to cover Facella's position, which left the vacancy for Mastronardi at the Elementary School. Smale indicated that if Tuers had not been on leave, then all the secretaries would have remained in their regular positions for that period. (N.T. 198-200, 225-226)

34. The District did not treat Mastronardi as a bargaining unit employe for the period of August 1, 2022 to September 23, 2022 and classified her as a substitute instead. Thus, the District did not pay Mastronardi the contractual salary for this period, but rather the substitute rate of $82.50 per day. The District did not provide Mastronardi with benefits for this period either. (N.T. 78-79, 82-83; District Exhibit 11, Joint Exhibit 2)

35. Mastronardi became a full-time bargaining unit secretary after September 23, 2022 and received the contractual pay and benefits at that point. (N.T. 67, 81-83)

36. Jessica Borger began working at the District as a monitor in September 2017. She testified that monitors supervise students and prevent misconduct. She resigned her position at the Middle School in March 2021. (N.T. 88-89)

37. Borger returned to work for the District in September 2022 as a monitor at the High School and worked every day for three to four hours from September 6, 2022 to January 20, 2023. Her AESOP records show that she was the only employe assigned to an open position for this period. (N.T. 89-92, 94-95, 243-244; Association Exhibit 4)

38. The District did not treat Borger as a bargaining unit employe for the period of September 6, 2022 to January 20, 2023 and classified her as a substitute instead. Thus, the District did not pay Borger the contractual rate of $11.24 an hour for this period, but rather the substitute rate of $9.15 an hour. (N.T. 93-94; District Exhibit 19, Joint Exhibit 2)

39. Borger testified that the District posted for the monitor position as a permanent position several times during the 2022-2023 school year while she was working in the substitute role. The District also offered

the position to Borger some time in December 2022 or January 2023, but she declined the position. (N.T. 97-102)

40. Nikki Haden-Coar began working for the District as a monitor in 2019. She was then furloughed in June 2022. (N.T. 104-105)

41. Haden-Coar returned to the District in the fall of 2022 to work as a monitor at the Elementary School. She worked 3.75 hours on frequent days in the monitor position from October 5, 2022 to May 24, 2023. Her AESOP records show that she was the only employe assigned to an open or extra position for this period, aside from October 31, 2022, November 23, 2022, and March 27, 2023, when she specifically filled in for Elizabeth Morgan and June Pepe, who were absent on those three dates. (N.T. 103-104, 107-108, 110-111; Association Exhibit 5)

42. The District did not treat Haden-Coar as a bargaining unit employe for the period of October 5, 2022 to May 24, 2023 and classified her as a substitute instead. Thus, the District did not pay Haden-Coar the contractual rate of $11.24 an hour for this period, but rather the substitute rate of $9.15 an hour. (N.T. 108-110; District Exhibit 21, Joint Exhibit 2)[1]

43. Joan Mattson began working for the District as a monitor at the Pleasant Valley Intermediate School in 2020. She was then furloughed in June 2022. (N.T. 115-116)

44. Mattson returned to work at the District's Middle School as a secretary for the 2022-2023 school year. She typically worked 3.25 hours on frequent days from November 1, 2022 to March 16, 2023. Her AESOP records show that she was the only employe assigned to a vacant position for this period. (N.T. 118-122, 125-126; Association Exhibit 6)

45. The District's Assistant Business Manager, Tammy Smale, testified that Mattson served as a substitute secretary for attendance from September 13, 2022 to October 14, 2022. Smale explained that Mattson began substituting for Doreen Dunlap, who went out for a medical leave, beginning on October 17, 2022 and ongoing. Smale described how Dunlap initially worked at the High School, but she subsequently transferred to the Middle School. Smale testified that this essentially left two vacancies once Dunlap went out on leave, one for Dunlap's previous position at the High School and one for her subsequent position at the Middle School, the latter of which was covered by Mattson. (N.T. 204-206; District Exhibit 15)

46. The District did not treat Mattson as a bargaining unit employe for the period of November 1, 2022 to March 16, 2023 and classified her as a substitute instead. Thus, the District did not pay Mattson the contractual salary for this period, but rather the substitute rate of $11.47 an hour. (N.T. 122; District Exhibit 15, Joint Exhibit 2)

47. Drita Beskovich began working for the District as a paraprofessional in 2014. She was then furloughed in June 2020. (N.T. 127, 138)

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[1] Association President VanHouwe testified credibly that the Association did learn about Haden-Coar's situation until March 14, 2023, which prompted the Association's amended charge of unfair practices on May 3, 2023. (N.T. 154-155). The amended charge was, thus, filed within four months of the Association's knowledge of the alleged unfair practice.

48. Beskovich returned to the District as a paraprofessional in the fall of 2022. She worked frequent full days from October 11, 2022 to December 21, 2022 as a paraprofessional in a kindergarten classroom at the Elementary School. Her AESOP records show that she was the only employe assigned to an open position for this period. (N.T. 131-136, 140; Association Exhibit 7)

49. The District did not treat Beskovich as a bargaining unit employe and classified her as a substitute instead. Thus, the District did not pay Beskovich the contractual salary, but rather paid her the substitute rate of $82.50 per day. The District did not provide Beskovich with benefits for this period either. (N.T. 135; District Exhibit 17, Joint Exhibit 2)

50. On December 21, 2022, the District's Principal of the Elementary School advised Beskovich that it was her last day of work. This was the only notice she received. (N.T. 136-137)

51. The Association never agreed to allow the District to pay these seven employes rates outside of the CBA and/or not provide them with contractual benefits. (N.T. 147-149)

52. Association President VanHouwe testified that she had a discussion with the District's Human Resources Director, Lori Fulmer, in September or October 2022, about Kimberly Tinker. VanHouwe described how Fulmer indicated that Tinker would only be in her position for ten days while the District evaluated whether the transfer student needed a one-to-one paraprofessional. VanHouwe explained how she agreed that the District could pay Tinker the substitute rate for those ten days, as long as the District treated Tinker as a bargaining unit employe if the situation lasted beyond those ten days. (N.T. 147-149)

53. Fulmer testified that she did not recall any such discussion with VanHouwe regarding Tinker. Fulmer also did not deny that such a discussion took place. (N.T. 254-255)

54. VanHouwe testified that she also had multiple discussions prior to December 2022 with James Konrad, the District's Superintendent, Rae Lin Howard, the Assistant Superintendent, Michael Simonetta, the Business Manager, and Fulmer, during the parties' monthly labor-management meetings. VanHouwe described how she objected to the District classifying these employes as long-term substitutes and indicated that open positions were a problem, which could lead to an unfair practices charge. The District officials never provided much of a response aside from "we'll look into it." (N.T. 151-154, 176)

55. Fulmer acknowledged during her testimony that VanHouwe repeatedly requested that the District recall employes and fill open positions during these meetings. (N.T. 255-256)

## DISCUSSION

The Association argues that the District violated Section 1201(a)(1) and (5) of the Act[2] by unilaterally decreasing the pay and/or benefits for the

[2] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or

seven bargaining unit employes set forth above, without first bargaining with the Association. The Association also submits that the District engaged in direct dealing when it unilaterally decreased the pay and/or benefits for those seven unit employes because the record shows that the District unilaterally changed those employes' pay and/or benefits, and the employes accepted it without any involvement by the Association. The Association further maintains that the District repudiated the CBA's pay and benefits provisions, as well as the recall provisions, when it unilaterally decreased the pay and/or benefits for those employes. The District, for its part, contends that the charge should be dismissed because the District did not have an obligation to bargain the pay and/or benefits for the employes in question. Specifically, the District claims that those employes are substitutes and therefore not included in the bargaining unit. The District also defends the charge on the grounds that the charge was untimely under the Act.

A public employer commits an unfair practice within the meaning of Section 1201(a)(1) and (5) of the Act by unilaterally changing employe terms and conditions of employment, which includes compensation in the form of wages and medical benefits. PSSU Local 668, SEIU v. Franklin County, 34 PPER ¶ 121 (Proposed Decision and Order, 2003)(*citing* Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978)). A public employer also commits an unfair practice by bypassing the designated bargaining representative of the employes and negotiating directly with employes in the bargaining unit. AFSCME Local No. 1971 v. Philadelphia Office of Housing and Community Development, 31 PPER ¶ 31055 (Final Order, 2000).

In Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), the Commonwealth Court opined:

> The rationale for considering the unilateral grant of benefits to be an unfair labor practice is that, even if unintentional, the role of the collective bargaining agent as the sole representative of all employees would be undermined if the school district could unilaterally bargain to give individual employees greater benefits than those negotiated for employees who bargained collectively. The issue is not whether the change is a benefit or a detriment to the employees, but whether it affects a mandatory subject of bargaining, i.e. wages, hours or other terms or conditions of employment. A unilateral change in a mandatory subject of bargaining constitutes a refusal to bargain in good faith and is an unfair labor practice because it undermines the collective bargaining process which is favored in this Commonwealth.

*Id.* at 738.

In this case, the Association has sustained its burden of proving that the District violated the Act by bypassing the exclusive bargaining representative and unilaterally decreasing the pay and/or benefits for the

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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.

seven bargaining unit employes at issue in the fall of 2022, without bargaining with the Association. For example, the record shows that Kimberly Tinker worked full-time for 110 days as a paraprofessional performing bargaining unit work from October 4, 2022 to April 20, 2023. However, the District did not treat Tinker as a bargaining unit employe and classified her as a "substitute" instead. Thus, the District did not pay Tinker the contractual salary and benefits she was entitled to pursuant to the CBA.[3] [4] Likewise, the record supports the same conclusion for Kelly Chiumento, who worked full-time as a paraprofessional from September 8, 2022 to October 6, 2022.[5] In fact, the same result obtains for all five remaining employes at issue, including Joanne Mastronardi, who worked full-time as a secretary from August 1, 2022 to September 23, 2022;[6] [7] Jessica Borger, who worked every day

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[3] While the parties entered into a successor CBA on November 3, 2022 for a term of July 1, 2022 through June 30, 2026, the charge has not been rendered moot because the employes in question continue to suffer residual effects of the District's unilateral changes in the form of wage and/or benefit losses. *See* AFSCME District Council 33 and Local 159 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005)(holding that the Board distinguishes between those charges where the employes continue to suffer the residual effects of an unlawful, unilateral change to wages, hours and working conditions, which are typically not moot, as opposed to those involving bargaining tactics which do not result in affirmative relief to the employes, but rather cease and desist orders, which are generally mooted by the parties' entry into a collective bargaining agreement).

[4] The District's liability for backpay owed to Tinker must be reduced by ten days given VanHouwe's agreement to allow Fulmer to pay Tinker the substitute rate for those initial ten days. VanHouwe's testimony on this point has been accepted as credible and persuasive. And, Fulmer failed to refute or contradict that such an agreement took place, testifying instead that she simply could not recall.

[5] Although the District eventually provided Chiumento with the contractual pay and benefits of a paraprofessional after October 6, 2022, Human Resources Director Fulmer admitted that the District did not make Chiumento's new classification as a bargaining unit employe retroactive to her first day on September 8, 2022.

[6] The record shows that Mastronardi became a full-time bargaining unit secretary after September 23, 2022 and received the contractual pay and benefits consistent therewith. Once again, however, the District did not make this designation retroactive to Mastronardi's first day on August 1, 2022.

[7] At the hearing, the District argued that the Association was precluded from presenting evidence prior to September 13, 2022 with regard to Mastronardi because the charge alleged that the improper pay and/or benefits began on September 13, 2022. (N.T. 70-72). However, Hearing Examiner Jack Marino recently rejected such an argument in Commonwealth Ass'n of School Administrators, Teamsters Local 502 v. School District of Philadelphia, 55 PPER 9 (Proposed Decision and Order, 2023), wherein he concluded that an incorrect date in the charge is not itself fatal unless the actual date results in an untimely filed charge. The Association filed the instant charge on December 8, 2022. Therefore, the dates of August 1, 2022 through August 7, 2022 are untimely as a matter of law. But it must be concluded that the District was nevertheless on notice of the specific allegations against it with regard to Mastronardi and appeared ready to defend itself adequately at the hearing going back to August 8, 2022 and thereafter, as that represents roughly the same time period encompassing the September 13, 2022 date contained in the charge. Indeed, there would only be a difference

for three to four hours as a monitor from September 6, 2022 to January 20, 2023;[8] Nikki Haden-Coar, who frequently worked as a monitor for 3.75 hours per day from October 5, 2022 to May 24, 2023;[9] Joan Mattson, who frequently worked as a secretary for 3.25 hours per day from November 1, 2022 to March 16, 2023; and Drita Beskovich, who frequently worked full days as a paraprofessional from October 11, 2022 to December 21, 2022. However, the District admittedly failed to provide all of these employes with the contractual pay and/or benefits they were entitled to under the CBA. Rather, the District deemed these employes "substitutes" and paid them a substitute rate of pay, which the District unilaterally set in December 2019. This was a clear refusal to bargain and plain evidence of direct dealing in violation of the Act.

The District argues that the charge should be dismissed because it had no bargaining obligation due to the seven employes being classified as "substitutes." The District asserts that substitutes are not included in the bargaining unit and not covered by the CBA, which entitles the District to pay them a unilaterally designated substitute rate that is inconsistent with the contractual rates set forth in the CBA. Indeed, the District went to great lengths at the hearing to adduce testimony regarding several employes who were allegedly out on leave, thereby creating vacancies that ostensibly needed coverage by "substitutes" during those periods. According to the District, this occurred notwithstanding the AESOP records indicating that the positions were "open" or "vacant," and that the employes involved were the only individuals assigned to the position. Unfortunately for the District, however, it has misapprehended the Board's law in this regard. The question at hand is not whether the seven employes at issue are "substitutes" as defined by the parties, but rather whether the employes are covered by the Board's original certification of the bargaining unit, as amended thereafter. And, without a doubt, it must be concluded that they are.

In 1971, the Board certified the Association as the exclusive bargaining representative for a "unit comprised of ***all full-time and regular part-time*** Custodial and Maintenance Employes, Clerical and ***Secretarial Employes***, Bus Drivers, ***Para-professional Aides***, and Food Service Employes; and excluding management level employes, supervisors, first level supervisors, confidential employes, and guards, as defined in the Act." (*See* PERA-R-9337-C)(Emphasis added). As such, the Board's original certification expressly covers at least two of the three positions at issue here, the paraprofessionals and secretaries. In addition, the District expressly recognized the Association as the exclusive bargaining agent for "personnel employed by the [School] Board as ***regular...monitors***." (Joint Exhibit 1, 2)(Emphasis added). The District did not argue at the hearing or in its post-hearing brief that the paraprofessional, secretarial, and monitor employes at issue were not full-time or regular part-time in any respect. In

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of a couple pay periods prior to the September 13, 2022 date, given that Article VII, Section 7.5 of the CBA requires the District to compensate employes on a biweekly basis. (Joint Exhibit 2).

[8] The District's liability for backpay, however, must cease effective the date in December 2022 or January 2023 when Borger declined the bargaining unit position.

[9] The District will also not be liable for backpay owed to Haden-Coar for the dates of October 31, 2022, November 23, 2022, and March 27, 2023 when she admittedly filled in for other absent employes and was effectively working as a causal employe on those dates rather than a full-time or regular part-time employe.

fact, such an argument would be untenable at best, as the record very clearly shows that each of these employes either worked full-time or easily satisfied the Board's test for regular part-time during the periods at issue.

The Board has held that regular part-time status exists when an employe works on a recurring basis with a reasonable expectation of continued employment. Independence Township, 27 PPER ¶ 27108 (Order Directing Submission of Eligibility List, 1996) *citing* Community College of Philadelphia v. Commonwealth, 423 A.2d 637 (Pa. Cmwlth. 1981), *aff'd*, 437 A.2d 942 (Pa. 1982). Employes who work at least one shift every week on a scheduled basis meet the test for regular part-time status. In the Matter of the Employes of Gettysburg Borough, 22 PPER ¶ 22083 (Order Directing Submission of Eligibility List, 1991) *citing* Borough of Whitaker, supra. However, part-time employes who work as a matter of special engagement with no reasonable expectation of continued employment are excluded from bargaining units as casual employes. *Id. citing* Erie County Area Vocational-Technical School v. PLRB, 417 A.2d 796 (Pa. Cmwlth. 1980).

As previously set forth above, the record shows that each of the employes in question worked on a full-time basis every day or at least on a regular weekly basis for the periods at issue. In fact, the CBA contains an even broader definition of a "regular" employe, as Article II, Section 2.3 defines a "regular" employe as "[a]ny employee who is employed on a regularly-scheduled work day, regardless of the number of hours worked." (Joint Exhibit 2).[10] Accordingly, there is little doubt that the employes at issue were bargaining unit employes for those periods. To be sure, each of these seven employes worked on a recurring basis and had a reasonable expectation of continued employment during the specific periods at issue. Therefore, the District was obligated to bargain with the Association before it unilaterally changed the pay and/or benefits for these paraprofessional, secretarial, and monitor employes.[11]

The District also maintains that the Association should not be permitted to rely on the District's AESOP records to establish the direct dealing portion of its charge. Once again, however, the District's argument is unavailing. The Association has not used the District's AESOP records to support its direct dealing averments in any significant manner. Instead, the Association used the District's AESOP records to establish how each of the seven bargaining unit employes in question worked a long-term assignment during the 2022-2023 school year in a vacant or open position rather than covering for absent employes. As such, the Association used the AESOP records then to demonstrate that the employes at issue were, in fact, bargaining unit employes. To the extent the District suggests that the direct dealing portion of the charge should not be sustained because there is no evidence of any direct negotiations between the District and the employes at issue, at least one Board hearing examiner has rejected such a notion and held that all that is necessary to sustain the direct dealing charge is that the District, acting unilaterally and without the Association's consent,

[10] The prior CBA contains the same definition for "regular" employes. (Joint Exhibit 1).

[11] The record does show that the parties have apparently bargained to exclude benefits for the part-time employes in the CBA. (Joint Exhibit 2). As a result, the make-whole remedy here must be limited to backpay for wages and pension contributions for the part-timers, while the full-timers will of course be entitled to a traditional award of full backpay to include benefits and pension contributions, as well as any out of pocket medical expenses.

decreased the employes' rate of pay during the fall of 2022 and that those employes accepted it. East Stroudsburg Area Education Support Personnel Ass'n v. East Stroudsburg Area School District, 54 PPER 65 (Proposed Decision and Order, 2023). Indeed, those employes were seemingly presented with a fait accompli, i.e. accept the District's offer to work for the lower substitute rate of pay or not work at all. This is clearly sufficient to sustain the direct dealing portion of the charge.

The District's argument that the charge is untimely is also without merit. Section 1505 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge." 43 P.S. § 1101.1505. As a general matter, the nature of the unfair practice claim alleged frames the limitations period for that cause of action. Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township, 32 PPER § 32101 (Final Order, 2001). For a refusal to bargain a change in terms and conditions of employment, notice to the union of the implementation of the challenged policy or directive triggers the statute of limitations. Harmar Township Police Wage and Policy Committee v. Harmar Township, 33 PPER § 33025 (Final Order, 2001). Implementation is the date when the directive becomes operational and serves to guide the conduct of employes, even though no employes may have been disciplined or corrected for failure to abide by the directive. *Id.*

Specifically, the District submits that if the Association wanted to challenge the District's use of substitute rates of pay, it should have done so years ago when the rates were allegedly approved at public meetings by the District's School Board. However, the Association has not challenged the District's general use of substitutes or their corresponding pay rates. To the contrary, the Association has only challenged the District's use of substitute pay rates in situations where the purported "substitute" is not filling in for any other absent employes and is instead the only employe in a long-term assignment, thereby satisfying the Board's definition for full-time or regular part-time employes, consistent with the original certification. The record shows that the District has never used non-bargaining unit substitutes to fill vacant or newly created positions that had no other employes assigned until the fall of 2022. As a result, the Association's charge dated December 8, 2022 was timely filed in this regard. Similarly, the record shows that the Association did not become aware of the situation regarding Nikki Haden-Coar until March 14, 2023, which prompted the timely amended charge on May 3, 2023. In any case, even if the District had used non-bargaining unit substitutes in such a fashion during previous school years, it would still not render the charge untimely here, as the Board has long held that a union does not forever waive its right to bargain future changes to a mandatory subject by its acquiescence, either express or implied, to the employer's previous unilateral changes in the subject matter. Temple University Health System, 41 PPER 3 (Final Order, 2010). Therefore, the District's timeliness argument must be rejected.

Finally, the Association has also alleged that the District repudiated the CBA's pay and benefit provisions, as well as the recall provisions of the contract. It is well settled that the Board exists to remedy violations of statute, i.e., unfair labor practices, and not violations of contract. Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). Where a breach of contract is alleged, interpretation of collective bargaining agreements typically is for the arbitrator under the grievance procedure set forth in the parties' collective bargaining agreement. *Id.* at

649. However, the Board will review an agreement to determine whether the employer has clearly repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. *Id.*

The Association has also sustained its burden of proving that the District violated the Act by repudiating the CBA pay and benefits provisions, along with the recall provision. As set forth above, the record shows that the District paid each of the seven employes at issue rates inconsistent with the CBA. In fact, the District has admitted the same, arguing that the employes were "substitutes" and not bargaining unit employes covered by the agreement. Unfortunately for the District, the record unequivocally shows that the employes are bargaining unit employes within the meaning of the Act, as they are clearly covered by the Board's original certification and even the express language of the parties' recognition clause. Furthermore, the record shows that several of the employes at issue were full-time and therefore entitled to benefits under the CBA, which the District refused to provide. And if that were not enough, the record additionally shows that the District repudiated the CBA recall provision by refusing to recall these furloughed employes during the 2022-2023 school year to the same classification they held when they were furloughed. Indeed, the District specifically admitted that it was recalling employes off the furlough list in the case of Kelly Chiumento and still refused to pay her the contractual rate and provide her with benefits. This was a clear repudiation of the CBA. Accordingly, the District has committed unfair practices within the meaning of the Act and will be directed to make all seven employes whole as a result thereof.

## 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 tender full backpay for lost wages and/or benefits to include out of pocket medical expenses and pension contributions, retroactive to the first respective day of employment, less any 10-day agreement to the contrary, along with six percent per annum interest, to Kimberly Tinker, Kelly Chiumento, Joanne Mastronardi, Jessica Borger, Nikki Haden-Coar, Joan Mattson, and Drita Beskovich, for the periods set forth above during the 2022-2023 school year;

(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;

(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 8th day of December, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| PLEASANT VALLEY EDUCATION SUPPORT PROFESSIONALS ASSOCIATION, PSEA/NEA | : | |
| v. | : | Case No. PERA-C-22-322-E |
| PLEASANT VALLEY SCHOOL DISTRICT | : | |

**AFFIDAVIT OF COMPLIANCE**

Pleasant Valley 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 tendering full backpay for lost wages and/or benefits to include out of pocket medical expenses and pension contributions, retroactive to the first respective day of employment, less any 10-day agreement to the contrary, along with six percent per annum interest, to Kimberly Tinker, Kelly Chiumento, Joanne Mastronardi, Jessica Borger, Nikki Haden-Coar, Joan Mattson, and Drita Beskovich for the periods set forth above during the 2022-2023 school year; 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