

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TREDYFFRIN-EASTTOWN EDUCATION :  
ASSOCIATION :  
:  
v. : Case No. PERA-C-09-508-E  
:  
TREDYFFRIN-EASTTOWN SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On December 23, 2009, the Tredyffrin-Easttown Education Association (Complainant or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Tredyffrin-Easttown School District (Respondent or District) alleging that the District violated Sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA).

On January 13, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and April 15, 2010, in Philadelphia was scheduled as the time and place of hearing if necessary.

On March 12, 2010, the Association filed an amended charge of unfair practices. On March 26, 2010 the Secretary issued an Amended Complaint and Notice of Hearing.

A hearing was necessary and was held as scheduled, but the hearing location was changed to the District's administrative offices. At the hearing, the parties entered 42 stipulations into the record. The parties were also afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Association filed a post-hearing brief on June 10, 2010 and the District did so on June 29, 2010.

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. The Tredyffrin-Easttown School District is a public employer within the meaning of Section 301(1) of the Public Employee Relations Act (PERA), 43 P.S. § 1101.301(1). (Stipulation No. 5)
2. The Tredyffrin-Easttown Education Association is an employe organization within the meaning of Section 301(3) of PERA, 43 P.S. § 1101.301(3) (Stipulation No. 6)
3. The Association is the exclusive representative for a unit of the District's professional employes. (Stipulation No. 7)
4. The Association and the District are parties to a collective bargaining agreement, which expires on June 30, 2012. (Stipulation No. 8, Joint Exhibit 1)
5. In the 2006-2007 school year, the District began a strategic planning process, which included holding a number of community meetings. (N.T. 66, 69)
6. In May 2007, the District's Strategic Planning Committee worked to develop a new mission statement, consensus beliefs and strategies to address the District's needs in the 21<sup>st</sup> century. (N.T. 126, District Exhibit 10)
7. The committee consisted of 30 persons, including community members, school board members, Association representatives, parents teachers, administrators and students. (N.T. 84, 127)

8. In June 2008, the School Board approved the District's new strategic plan. (N.T. 69, District Exhibit 10)

9. One of the plan's strategies directly addresses the leveraging of technology for the purpose of transforming learning. (N.T. 126, District Exhibit 10)

10. Another strategy was to create the position of Director of Electronic Learning. (N.T. 67)

11. The District's job description for this position includes developing criteria for online courses; piloting an online coursework program; developing, directing and modifying an operational framework for technology in kindergarten through grade 12; and working with other school districts to learn about best practices in the area of online coursework specifically, as well as about electronic learning in general. (N.T. 68)

12. The District appointed Dr. Delvin Dinkins to the position of Director of Electronic Learning. (N.T. 67)

13. In September 2009, the District implemented a pilot program for students consisting of online learning (E-Learning Pilot Program). (Stipulation No. 9, N.T. 70)

14. The courses in the E-Learning Pilot Program consisted of Latin I and II, German I, and Visual BASIC, which were offered to the District's high school students. (Stipulation No. 12, N.T. 70)

15. The courses in the E-Learning Pilot Program were only offered online. The E-Learning Pilot Program courses were taught by instructors who were not members of the bargaining unit. (N.T. 85-86)

16. Prior to implementation of the E-Learning Pilot Program, these courses were previously taught exclusively by bargaining unit members. (Stipulations 27, 31, 33, 38)

17. Prior to offering the E-Learning Pilot Program courses online the District would, from time to time, cancel courses due to low enrollment. There is, however, no official policy concerning minimum enrollment for courses. (N.T. 24)

18. Dr. Dinkins testified that it has been his experience that the District uses fifteen (15) students as a rule of thumb, "but there's no hard cap." (N.T. 70)

19. In fact, the District has offered courses with enrollment lower than 15 students. (N.T. 24-25, 56)

20. In 2004-2006, Amy Alvarez, a high school chemistry teacher, taught a section of chemistry to eight (8) students. (N.T. 56)

21. Additionally, Ms. Alvarez has taught combined classes, where two sections of students are scheduled during the same class period. (N.T. 56-57)

22. The Association's president, Debra Ciamacca, testified that she was aware of courses with as few as eleven (11) students. (N.T. 40; Stipulation No. 28)

23. In May 2009, when the District offered students the opportunity to take cancelled courses online, it did not provide the Association with a copy of the notification letter. (N.T. 72-73, 85; District Exhibit 13)

24. Twenty-three (23) students participated in the E-Learning Pilot Program during the 2009-2010 school year. (Stipulation No. 13)

25. The District paid the cost of the courses for participating students, which range from \$300 to \$800 per student depending upon the subject matter and the length of the course. (Stipulation No. 15)

26. The students' schedules permitted up to one (1) period per day for the students to participate in E-Learning Pilot Program courses. The students were permitted to work during that time or they could work during a different period before school, after school, from home, or over weekends. (Stipulation No. 16)

27. Students could be found on a regular basis in the conference room set aside for this pilot project, located in the rear of the library. (Stipulation No. 17)

28. No bargaining unit members, however, were assigned to monitor the students participating in the E-Learning Pilot Program. (Stipulation No. 18)

29. Specifically, the librarian, a bargaining unit member, was not assigned to interact with these students while they were in the library conference room. (Stipulation No. 19)

30. The District accepts credits earned in the E-Learning Pilot Program courses toward the minimum credit requirements for graduation. (N.T. 75, 122)

31. The E-Learning Pilot courses are also accepted as meeting Pennsylvania's graduation requirements. (N.T. 98, 122)

32. Numeric grades reflecting students' achievement in the E-Learning Pilot Program courses are issued by the non-bargaining unit E-Learning teachers. (N.T. 73, Stipulation No. 23)

33. The Extended Learning Opportunities brochure indicates that "grades earned in online courses will be included in honor roll calculations but will not be included in the student's grade point average." (Association Exhibit 1, p.2)

34. The grades issued by the non-bargaining unit E-Learning teachers for the E-Learning Pilot Program courses do not appear on report cards issued by the District or on Conestoga High School transcripts. (N.T. 73,74, Stipulation No. 24)

35. The grades, however, appear on a transcript from the E-Learning Provider and are attached to the Conestoga transcript. Prior to the subcontracting of these courses through the E-Learning Pilot Program, the tests and quizzes for these courses were given and proctored by bargaining unit members, and grades reflecting student achievement were issued by bargaining unit members and appeared on students' report cards. (Stipulation Nos. 34-36)

36. The completed E-learning Pilot Program courses may be used by the students to satisfy prerequisites for subsequent Conestoga High School classes in World Languages, and E-learning Pilot Program language students may count the E-Learning Pilot Program courses, if needed, toward the language requirement for graduation. (Stipulation Nos. 25, 26)

37. In 2008, during bargaining of the current collective bargaining contract, the concept of online learning was discussed in three conversations at three bargaining sessions. However, at no time during the negotiations did the District indicate that it intended to implement online learning. Also, the parties did not discuss specific details of the programs. (N.T. 49-52)

38. Dr. Dinkins, testified that the District did not have a defined program of electronic learning when he assumed his position in July 2008. (N.T. 65-66)

39. The Association president, Ms. Ciamacca, and another officer were members of the committee which drafted the District's strategic plan. She testified that she believed that she was one of the two or three people who crafted the words "boundary-less classroom". (N.T. 127-128)

40. She testified that it was never her intention that non-bargaining unit members would instruct the District's students using this new technology to the exclusion of bargaining unit members. (N.T. 83-84, 128-129; District Exhibit 10)

41. The strategic plan does not indicate that non-bargaining unit members would instruct the online courses. (N.T. 84)
42. Ms. Ciamacca testified that the "entire time during that period, not one word was mentioned about non-TE teachers teaching these courses." (N.T. 129)
43. On October 20, 2009, the Association demanded to bargain with the District concerning the E-Learning Pilot Program. (Stipulation No. 10; Joint Exhibit 2)
44. The District denied the Association's demand to bargain by letter dated November 10, 2009, but offered to meet and discuss the issue. (Stipulation No. 11; Joint Exhibit 3)
45. The Association declined the invitation to participate in a meet and discuss. (Stipulation No. 11)
46. After the Association filed its charge in this case, the District distributed the Extended Learning Opportunities brochure to students in January 2010, as part of an insert to the Program of Studies for the purpose of course selection for the 2010-2011 school year. (N.T. 19, 76; Association Exhibit 1)
47. The brochure listed almost 40 online courses to be offered for the upcoming school year. (N.T. 19)
48. Ms. Ciamacca testified that she was very concerned about the "magnitude of the number of courses". (N.T. 19)
49. Ms. Ciamacca contacted the Superintendent and he explained to her that the District was limiting the number of students for whom the District would pay tuition for online courses to 100 students. (N.T. 20)
50. Dr. Dinkins testified that not all of the courses listed in the Extended Learning Opportunities brochure would be offered during the 2010-2011 school year because the brochure was revised after distribution. (N.T. 76)
51. Dr. Dinkins testified that the District has made approximately twenty-five (25) electronic courses available for students to take in the 2010-2011 school year. (N.T. 75)
52. Dr. Dinkins testified that these courses would not be offered at all by the District if they were not offered as E-Learning courses. (N.T. 77)
53. The Extended Learning Opportunities brochure indicates that "[s]tudents may not use online coursework to exceed eight Conestoga credits in an academic year." (N.T. 11, Association Exhibit 1, p. 2)
54. The District's graduation requirements are that students must successfully complete 24.0 credits in grades 9 through 12. (N.T. 11, Association Exhibit 3, p.4)
55. The Association president testified that after reviewing the course outlines of some of the proposed online courses listed in the Extended Learning Opportunities brochure, she found that "the content that was being taught were similar to the parts of content that were being taught already in Conestoga High School." (N.T. 21)
56. Ms. Ciamacca testified that courses currently taught by bargaining unit members include the content in the proposed online courses. (N.T. 21-23)
57. Ms. Ciamacca testified that based upon her review of Association Exhibit 1 and the research she performed bargaining unit members are certified to teach these proposed online courses. (N.T. 22; Association Exhibit 2)
58. Ms. Ciamacca further testified that the current courses which include the proposed online course content have been previously taught by only bargaining unit members. (N.T. 23)

59. The work of instructing and assessing students in the proposed online courses is no different than the course instruction and assessment of students in current courses. (N.T. 25-27)

#### DISCUSSION

The Association's charge of unfair practices alleges that the District unilaterally transferred bargaining unit work when it began offering students online computer courses, known as an E-learning program. The parties stipulated that in the pre-digital era, the teaching of the courses was work that was previously performed exclusively by the bargaining unit. In the first year, 2009-10, the District offered students four courses as a pilot program. In the 2010-11 school year it is offering 25 courses. The Association amended its charge on March 12, 2010, to include allegations of the expansion of the program.

A public employer commits an unfair practice in violation of Sections 1201(a)(1) and (5) of PERA when it unilaterally transfers work that was performed exclusively by the bargaining unit to a non-bargaining unit entity. PLRB v. Mars Area School District, 389 A. 2d 1073 (Pa. 1978).

A unilateral removal of bargaining unit work occurs in two situations. First, "an unfair practice occurs when an employer unilaterally removes work exclusively performed by the bargaining unit without prior negotiations." Wyoming Valley West School District, 32 PPER ¶ 32008 (Final Order, 2000). Second, an unfair practice occurs when "the employer significantly alters its past practice regarding the assignment of bargaining unit work to non-unit members if the employer varies the extent to which members and non-members of the bargaining unit have performed the same work." Id. at 28-29.

In the context of a public school district's professional employe bargaining unit, course instruction is bargaining unit work. The unilateral transfer of that work constitutes an unfair practice. In Midland Borough School District, 560 A.2d 303 (Pa. Cmwlth. 1989) the Commonwealth Court held that a district committed an unfair practice when it unilaterally "tuitioned out" all instruction of students in grades seven through twelve to a neighboring district and furloughed its own teachers.

The work of instructing and assessing students in the online courses in the E-learning Pilot Program and proposed expansion of the program is the same as the work that is currently being performed by bargaining unit members who are instructing and assessing students in other subjects. (Stipulations 21, 23 and 34-36). The Association has made a prima facie case that the District violated Sections 1201(a)(1) and (5) of PERA by unilaterally transferring bargaining unit work of educating and assessing students to an outside provider.

The District raises several defenses. The first is that the decision to offer online courses is a proper exercise of "inherent managerial policy " under Section 702 of PERA and therefore, not a mandatory subject of bargaining. Specifically, the District contends that the decision to offer online courses falls under the provisions in Section 702 regarding the utilization of technology. (43 P.S. 1101.702)

The Board has held that the introduction of new technology does not remove the District's obligation to bargain with the Association over the removal of bargaining unit work. "Where non-unit personnel perform work through use of new technology that is substantially equivalent to work previously performed by the bargaining unit on an exclusive basis, the Board will find a duty to bargain over assignment of such work out of the unit." FOP Lodge 5 v. City of Philadelphia, 31 PPER 31022 (Final Order, 1999), citing FOP, Lodge 5 City of Philadelphia, 27 PPER 27161 (Final Order, 1996).

In Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 144 (Final Order, 2005), aff'd 912 A.2d 909 (Pa. Cmwlth. 2006), the Board held that the employer violated its duty to bargain when it implemented a technologically advanced consolidated dispatch center and then transferred the supervision of the system to civilian supervisors who were not in the bargaining unit. The Pennsylvania State Troopers Association (PSTA), which represents the bargaining unit, filed a charge. The Board agreed with the PSTA, finding that the civilian supervisors were performing the same supervisory functions that had been done by bargaining unit members.

The District also raises several other defenses that fall within one of the other matters of inherent managerial policy under Section 702 of PERA, either that the decision relates to the functions and programs of providing education, overall budget and the selection and direction of personnel. (43 P.S. 1101.702)

The District argues that the decision was consistent with the District's past practices and current District policy of offering students other curriculum programs. The District points to Tredyffrin-Easttown Education Association v. Tredyffrin-Easttown School District, 29 PPER 29215 (Final Order, 1998) as a PLRB precedent allowing the District to contract with non-bargaining unit employees to teach classes. However, the facts of that case are different. In that case, the Association challenged the District's decision allowing students to take independent physical education classes from non-bargaining unit members and allowing non-bargaining unit non-bargaining unit members to then approve the independent physical education classes. Hearing Examiner Donald Wallace found that while the classes themselves were not evidence of a unilateral transfer, since the District had a long policy of allowing students to take independent study in physical education, there was a unilateral transfer of bargaining unit work by allowing non-bargaining unit members to approve the independent study so that the students would comply with graduation requirements.

The present case is distinguishable because of the broad scope of the work being transferred. In the prior case, there was a limited amount of work, independent physical education classes. The District's decision to offer 25 online courses, which may lead up to eight (8) credits per academic year, is a significant change in the past practice of non-bargaining unit members performing bargaining unit work. The Board, as stated above, will find an unlawful transfer of bargaining unit work where the transfer upsets a long practice or where the transfer is an expansion of the practice. In Lake Lehman Educational Support Personnel Association v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006), citing AFSCME v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992) the Board found that a school district unlawfully expanded the scope of the work of a non-bargaining unit food services company by having this company staff an after-hours reception for a new superintendent.

The District's next defense is that in addition to offering alternative physical education courses, there are five other examples of the District utilizing non-bargaining unit members to do bargaining unit work: homebound instruction due to illness or medical needs; online special education; itinerant math instruction; dual enrollment courses and social entrepreneurship and community leadership classes.

However, the Association demonstrated that these examples are distinguishable from the present case and should not be used to excuse the District's obligation to bargain.

As for homebound instruction, the students receiving this instruction are, by definition, unable to attend school for specified reasons for at least one month. (Association Exhibit 6) The students in the E-Learning pilot Program and the expansion of the program are able to attend school. The instructors teaching students in the homebound program are employed by the District to perform such services. The compensation for these instructors is set by the collective bargaining agreement between the Association and the District.

As for the online special education program, the Association was not aware of the situations where this was being provided. The course request forms (District Exhibit 12) were not provided to the Association. Even though individual teachers may have been informed due to their relationship as the student's teacher or case manager, the information was not provided to them in a capacity as representative of the Association and therefore, does not constitute notice to the Association. The individual teachers are not officers of the Association.

As for the itinerant math teachers instructing District students, Ms. Ciamacca, the Association president, was similarly unaware of this program.

Dual enrollment or enrollment of high school students in courses for credit towards both high school graduation and toward receipt of a post-secondary degree, while not a

new practice among Commonwealth schools, was specifically authorized by the General Assembly in Act 46 of 2005, which, among other things, created Article XVI-B of the School Code, Opportunities for Educational Excellence. 24 P.S. §16-1601-B et seq. It provides for the concurrent enrollment of high school students in courses provided pursuant to agreements with two-year and four-year institutions of higher learning. This section of the school code is significant. It permits courses to be offered pursuant to this article to be taught either by postsecondary faculty or by regular professional employees of a school district in the employ of a postsecondary institution as adjuncts. Second, it requires that a district furlough none of its regular professional or paraprofessional employees in order to make it possible to offer the courses, thus protecting the jobs of the existing employees of any districts offering the courses pursuant to this article. Finally, it states that the article shall not be construed to supersede or preempt any provision of a collective bargaining agreement. These points are significant because in the case of dual enrollment classes, the District was acting well within its rights as defined by state law and not violating PERA.

As for the social entrepreneurship and community leadership class, Ms. Ciamacca testified that she was the liaison for students taking these classes. She assisted with the assignment of grades to students. The classes took place off campus. She was compensated by the District for her work. Another bargaining unit member is currently involved with this program. In view of these facts, it is difficult to conclude that the Association allowed the District free reign to transfer bargaining unit work in that area of instruction, nor in the present area of online instruction.

All of these five examples are distinguishable in kind and degree from the bargaining unit work in dispute in the E-Learning Program. Also, none of the situations above involved non-bargaining unit members instructing students online. Second, the extensive online learning course offerings for 2010-11 are a significant departure from the past practice concerning the instruction of courses by bargaining unit members and non-bargaining unit members. Finally, the prior situations in which non-bargaining unit members provided instruction to students was limited in scope and in some cases, the Association was unaware it was even taking place.

The District's next argument that this is a Section 702 matter of inherent policy is that the online teaching of these courses has never been bargaining unit work. This argument begs the very question of the dispute. The bargaining unit work is the teaching of courses and assessing students. By the District having non-bargaining unit contractors do that work in an online fashion, bargaining unit members are not doing the work of teaching and assessing students for these courses.

The District's last argument is that the work was not bargaining unit work at all because these academic subjects had ceased being taught because of low enrollment. According to the District, only courses with a certain enrollment, by definition, could be bargaining unit courses. This argument misses the point that the teaching of students is bargaining unit work and that the Association has never agreed to a minimum enrollment definition of courses that are bargaining unit work. Furthermore, the Association witnesses credibly testified that the District did not have a consistent policy of an enrollment minimum for an academic subject to make the list of courses being offered.

The District's defenses are insufficient to overcome the prima facie case made by the Association that the District unilaterally transferred the work of teaching and assessing students to a non-bargaining unit contractor. Accordingly, the conclusion that must be reached is that the District's E-Learning Program is a transfer of bargaining unit that violates Sections 1201(a)(1) and (5) of PERA.

#### CONCLUSIONS

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

1. That the Tredyffrin-Easttown School District is a public employer within the meaning of Section 301(1) of PERA.

2. That the Tredyffrin-Easttown Education Association is an employe organization within the meaning of Section 301(3) of PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the District has committed unfair practices in violation of Sections 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 under PERA;

2. Cease and desist from refusing to bargain with the employe representative which is the exclusive representative of the District employes, including but not limited to bargaining with the Association prior to subcontracting bargaining unit work.

3. Take the following affirmative action:

(a) Rescind the E-Learning Pilot Program and the expansion of that program as offered in the 2010-2011 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 twenty-eighth day of February, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner