COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYOMING VALLEY WEST EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-99-549-E
WYOMING VALLEY WEST SCHOOL DISTRICT	:	

FINAL ORDER

On September 13, 2000 the Wyoming Valley West School District (District) filed timely exceptions and a brief in support with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued August 24, 2000. The Wyoming Valley West Educational Support Personnel Association PSEA/NEA (Association) filed a response to the District's exceptions on September 22, 2000 and pursuant to an extension of time, filed a brief on October 30, 2000. The District excepts to various findings of fact in the PDO as well as the hearing examiner's ultimate conclusion that the District committed unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally changing the established practice of assigning stadium cleaning work to: (1) bargaining unit members only or (2) to both bargaining unit members and volunteers, during normal working hours when overtime compensation was not available.

Maintenance employes, utility employes and custodians are the members of the bargaining unit responsible for cleaning the District's stadium. On approximately 30 occasions during one or two years prior to September 1999, the District assigned non-unit volunteer students and inmates the work of cleaning the stadium. The volunteers always worked alongside members of the bargaining unit during the unit employes' normal working hours. For the first time on September 17, 1999, the District assigned the work of cleaning the stadium to the volunteers alone. The District made the same assignment on Sunday October 3, 1999. The decision to use volunteers on these two occasions was made by the superintendent without bargaining with the Association.

The District excepts to findings of fact four and five: "[t]hat the maintenance employes have always performed the duty of cleaning the District's stadium" and "that . . . other members of the unit (utility employes or custodians) also perform such work." (PDO at 1). The District argues that these findings are erroneous because the student and prisoner volunteers have also assisted in cleaning the stadium. These exceptions are dismissed for multiple reasons. First, these findings are fully supported by substantial evidence of record, as indicated by the citations to the notes of testimony following each finding. Second, the Hearing Examiner did not find that <u>only</u> maintenance employes performed this work. Third, the Hearing Examiner fully explained the work of the volunteers in finding of fact eight. These findings are not contradictory – a finding that volunteers assisted the bargaining unit members in cleaning the stadium for one to two years prior to September 1999, does not preclude a finding that the maintenance employes have always performed this duty, or that utility and custodial workers have also performed this duty. The District erroneously extends "always performed the work" to

"exclusively performed the work." For these reasons, the District's first two exceptions are dismissed.

The District's remaining exceptions concern the Hearing Examiner's findings and conclusions regarding overtime compensation. The Hearing Examiner found that the bargaining unit employes receive overtime compensation for working outside of their normal working hours of 7:00 a.m. to 3:30 p.m. Monday through Friday. He further found that when the stadium needed to be cleaned on evenings or week-ends, when bargaining unit members were eligible for overtime compensation, the unit members alone performed that work. Finally, he found that if the District had decided to assign the stadium cleaning work to bargaining unit members on September 17 and Sunday October 3, 1999, the members would have received overtime compensation for that work. After reviewing the record and the factual findings, the Board is satisfied that there exists substantial evidence to support the findings made by the Hearing Examiner. See In the Matter of the Employes of City of Bethlehem, 22 PPER ¶ 22094 (Final Order, 1991). There is sufficient testimonial support for finding that bargaining unit members are paid overtime compensation when they work evenings and weekends. Donald Neely (Neely), a utility worker and the vice president of the Association testified that the volunteers never worked in the evenings, when the work would require overtime compensation for the bargaining unit members. (F.F. 6, N.T. 28-29) This testimony was corroborated by the District's Superintendent, Andrew Marko (Marko), who described several scenarios when bargaining unit members were paid overtime compensation when they were required to work on Saturday, Sunday and/or evenings. (F.F. 6, N.T. 40). Neely also testified that when the stadium needed to be cleaned in the evening, the work was always performed by bargaining unit employes. (F.F. 8, N.T. 24). The Hearing Examiner found this testimony credible and the Board will not disturb the Hearing Examiner's credibility determinations absent compelling circumstances, and the Board's review of this record indicates no such compelling circumstances. AFSCME v. Commonwealth, 12 PPER ¶ 12246 (Final Order, 1981); AFSCME, District Council 85 v. Commonwealth, 18 PPER ¶ 18029 (Final Order, 1986). The District argues that if the volunteers had not been used in the thirty prior cleaning incidents, overtime may have been available to members of the bargaining unit. While this may be true, it does not contradict the Hearing Examiner's findings of fact and it is also not determinative in the decision of this case.

The District finally excepts to the Hearing Examiner's ultimate conclusion that the District violated its bargaining obligation under Section 1201(a)(1) and (5) of PERA. It is well established that the Board will find such a violation in either of two circumstances. First, an unfair practice occurs when an employer unilaterally removes work exclusively performed by the bargaining unit without prior negotiations. APSCUF v. PLRB, 661 A.2d 898 (Pa. Cmwlth. 1995)(unfair practice to unilaterally transfer bargaining unit work to persons outside the unit, such persons being non-bargaining unit employes of that same employer, outside contractors, volunteers, etc. without prior negotiation with the employe representative); AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992); Athens Area Sch. Dist. v. PLRB, 23 PPER ¶ 23183 (Common Pleas Bradford County, 1992); Midland Borough Sch. Dist. v. PLRB, 537 A.2d 303 (1989) appeal denied, 525 Pa. 650, 581 A.2d 576 (1990); PLRB v. Mars Area Sch. Dist., 480 Pa. 295, 389 A.2d 1073 (1978). AFSCME, Council 13 v. PLRB, supra; AFSCME, Council 13 v. Dep't of Agriculture, 22 PPER ¶ 22186 (Final Order, 1991; York Paid Firefighers Ass'n, Local 627 v. City of York, 19 PPER ¶ 19037 (Final Order, 1988); PLRB v. City of Philadelphia, 18 PPER ¶ 18048 (Proposed Decision and Order, 1987). The record is clear that the bargaining unit

members have not performed the stadium cleaning work exclusively, at least since one or two years prior to September 1999, when the District began using the volunteers.

Second, the Board will find a violation of Section 1201(a)(1) and (5) if the employer significantly alters its past practice regarding the assignment of bargaining unit work to non-unit members or if the employer varies the extent to which members and non-members of the bargaining unit have performed the same work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); Northern Tier Career Center, 28 PPER ¶ 28066 (Final Order, 1997); Construction, Gen. Laborers and Material Handlers Local 1058 v. Westmoreland-Fayette Municipal Sewage Auth., 30 PPER ¶ 30104 (Proposed Decision and Order, 1999). The fact remains that during those thirty incidents prior to September 1999, the volunteers worked alongside members of the bargaining unit, during their normal working hours of 7:00 a.m. to 3:30 p.m., Monday through Friday. On September 17 and October 3, 1999, the District assigned this work to the volunteers, without also offering it to the bargaining unit members as in the past, and outside of the unit's normal working hours, thus impacting opportunity for overtime. This represents a significant change in past practice regarding the assignment of stadium cleaning work to non-bargaining unit members.

The District argues that this conclusion is contrary to Wyoming Valley Educ. Support Personnel Assoc. v. Wyoming Valley West Sch. Dist., 29 PPER ¶ 29160 (Proposed Decision and Order, 1998)(no violation because some of the work at issue had not been exclusively performed by the bargaining unit). Because neither party filed exceptions to that 1998 proposed decision, the Board never reached its merits. In that case, the hearing examiner applied only the exclusivity aspect of the test and did not consider the extent to which the employer changed the past practice of assigning bargaining unit work, as mandated by the Commonwealth Court in AFSCME, Council 13 v. PLRB, supra. The Board finds that the Hearing Examiner applied both applicable standards to the facts of this case and his conclusion is consistent with both Board and Court precedent.

In Northern Tier Career Center, supra the Board concluded that where non-bargaining unit students had been assisting a bargaining unit cafeteria worker with one task, one to two days per week, the employer violated Section 1201(a)(1) and (5) of PERA when it shifted all of the work to the students, because the transfer was inconsistent with past practice in a significant way. Like these students, the volunteers only assisted the bargaining unit members occasionally during their normal working hours. When the District transferred the work to the volunteers alone on September 17 and October 3, it significantly changed past practice and thereby violated Section 1201(a)(1) and (5) of PERA. Similarly, in Northwestern School District, 16 PPER ¶ 16108 (Proposed Decision and Order, 1985), the hearing examiner concluded that an employer violates its bargaining obligation by using unpaid volunteers in place of paid bargaining unit members, even when no bargaining members were furloughed. In Athens Area Sch. Dist., supra, the court reached the same conclusion and found the fact that no bargaining unit employes were furloughed when the employer transferred bargaining unit work to volunteers was not determinative. In Central Greene Educ. Support Personnel Assoc. v. Central Greene Sch. Dist, 25 PPER ¶ 25111 (Proposed Decision and Order, 1994), where both students and a librarian performed similar duties, the hearing examiner explained that "even a change in the pattern by which members and non-members of a bargaining unit have performed the same work is bargainable . . . [where] the degree to which they previously performed that work has changed." 25 PPER

¶ 25111 at 282-283. See also Westmoreland-Fayette Municipal Sewage Auth., 30 PPER ¶ 30104 (Proposed Decision and Order, 1999)(no duty to bargain where union does not prove that the employer varied the extent to which members and non-members of the bargaining unit have performed the same work); K-5 Bargaining Unit Enforcement Officer 3's v. Commonwealth of Pennsylvania (State Police, Bureau of Liquor Control), 28 PPER ¶ 28001 (Proposed Decision and Order, 1996)(no duty to bargain where employer did not make a demonstrable change in the pattern of assignment of work without prior negotiations). The Proposed Decision and Order is consistent with the unilateral transfer of bargaining unit work analysis employed in these cases. The District unilaterally changed the pattern of assigning the stadium cleaning work when it assigned the work to the volunteers alone, without the bargaining unit members being present, outside of the members' normal working hours. The District did not engage in negotiations prior to varying the extent to which members and non-members performed the same work.

After a thorough review of the exceptions and all matters or record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions be and the same are dismissed and the Proposed Decision and Order be and the same is made absolute and final.

SEALED, DATED AND MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of November, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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AFFIDAVIT OF COMPLIANCE

The Wyoming Valley West School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of PERA; that it has rescinded use of non-unit personnel to perform stadium cleaning work outside of the normal working hours of the members of the bargaining unit who perform such work; that it has made affected bargaining unit members whole for the overtime pay they would have received if they had been assigned to clean the stadium on September 17 and October 3, 1999; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; 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