COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| INDIANA AREA SCHOOL DISTRICT | : | |
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| v. | : | Case No. PERA-C-03-41-W |
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| INDIANA AREA EDUCATION ASSOCIATION, PSEA/NEA | : | |

**FINAL ORDER**

On March 18, 2004, the Indiana Area Education Association, PSEA/NEA, (Union) timely filed with the Pennsylvania Labor Relations Board (Board) exceptions and a supporting brief to a Proposed Decision and Order (PDO) issued March 1, 2004. In the PDO, the Examiner concluded that the Union violated Section 1201(b)(3) of the Public Employe Relations Act (PERA) by refusing to bargain with the Indiana Area School District (District) over wages, hours and other terms and conditions of employment for three school nurse assistant R.N.'s (assistant nurses) who were accreted into the professional bargaining unit.

On December 10, 1970, the Board, at Case No. PERA-R-310-W, certified the Union as the exclusive representative of a unit comprised of classroom teachers, guidance counselors, and librarians, excluding all supervisors, first level supervisors, and confidential employes. The District presently employs three certified school nurses. They work at the senior high school, junior high school and Ben Franklin Elementary. The District also employs three assistant nurses. They work at Eisenhower Elementary, East Pike Elementary and Horace Mann Elementary. On April 30, 2001, the District and the Union executed the collective bargaining agreement (CBA) for the employes in that unit for the period from July 1, 2001 to June 30, 2007. Article II, Section 2 of the CBA provides that the District recognizes "Nurses Under Contract" as covered by the CBA.

On March 20, 2002, the Union filed a petition for unit clarification seeking to include the position of assistant nurse in the bargaining unit. (PERA-U-02-144-W). On May 23, 2002, the District withdrew its opposition to the petition. On September 9, 2002, the Board issued a Nisi Order of Unit Clarification amending the unit certification to include the position of assistant nurse. On September 19, 2002, the Union requested confirmation from the District that the assistant nurses were receiving the rights, benefits and privileges of the CBA, including placement on the salary schedule, following the Board's unit clarification order. On September 24, 2002, the District informed the Union that the assistant nurses, although included in the bargaining unit, were not covered by the CBA, and the District initiated negotiations.

On October 7, 2002, the Union filed a grievance claiming that the District was violating the CBA by denying the assistant nurses contractual rights. After attempting to process the grievance through the various steps outlined in the CBA, the Union requested arbitration

on January 8, 2003. On January 31, 2003, the Union requested an arbitration panel from the Bureau of Mediation. On February 11, 2003, the Bureau of Mediation sent to the parties a panel of arbitrators for the grievance. On February 18, 2003, the District refused to choose an arbitrator from the panel. The Union filed an unfair practice charge against the District on February 20, 2003 alleging that the District committed a bargaining violation for refusing to submit to arbitration. (Case No. PERA-C-03-61-W). The Examiner found an unfair practice at Case No. PERA-C-03-61-W for the District's refusal to arbitrate, the District excepted and the Board today issues a final order dismissing the District's exceptions.

In its exceptions, the Union raises the following: (1) the conclusion that the Union violated 1201(b)(3) is in error as long as the District must submit to grievance arbitration as a result of the ruling in PERA-C-03-61-W; (2) the Examiner misapplied State System of Higher Educ. v. APSCUF (SSHE I), 800 A.2d 983 (Pa. Cmwlth. 2002); and (3) the Examiner erred in concluding that the Union lacked a "sound arguable basis" for maintaining that it did not have a duty to bargain.

The Union contends that the orders, in these cases requiring negotiation here, and in PERA-C-03-61-W requiring arbitration, are inconsistent with SSHE I. In SSHE I, the union requested that the employer apply the existing collective bargaining agreement to 12 non-faculty athletic trainers newly accreted into the bargaining unit which already included faculty athletic trainers. The employer, however, sought negotiations maintaining that the existing agreement did not cover the non-faculty trainers. The union grieved and demanded arbitration. Although the employer submitted to arbitration, unlike the District here, the union also filed an unfair practice charge for refusing to comply with the agreement. The Union's charge was deferred to arbitration. The employer also filed an unfair practice charge against the union for refusing to negotiate. This charge was not deferred. The arbitrator concluded that the contract did apply to the new employes. In the Commonwealth Court, on appeal from the arbitration award, the employer challenged the arbitrator's conclusions that the grievance was arbitrable and that the non-faculty trainers were covered by the agreement.

The SSHE I Court specifically addressed the following question: "[w]hen a newly added group becomes part of a bargaining unit that is already governed by a CBA, is the union or the employer required to bargain over the terms and conditions of their employment?" Id. at 985-86. The Court, recognizing that the arbitrator has jurisdiction to determine arbitrability in the first instance, subject to court review, stated that, "if as a matter of law, the agreement applies to newly added employees, the arbitrator has jurisdiction; if not the arbitrator does not have jurisdiction to hear the matter." Id. at 985 n.5, 986. Accordingly, the SSHE I Court specifically addressed the narrow issue of whether the arbitrator erred in concluding that the parties' agreement applied to the newly accreted employes. The SSHE I Court did not address whether the union committed an unfair practice for refusing to bargain with the employer for newly accreted employes, which is the issue presented here. Therefore, contrary to the Union's assertion, the Examiner's conclusion that the Union violated its duty to bargain with the District was not addressed by SSHE I and therefore is not inconsistent with SSHE I.

State System of Higher Educ. v. PLRB (SSHE II), 821 A.2d 156 (Pa. Cmwlth. 2003), arises from the same facts as SSHE I. In SSHE II, the Commonwealth Court affirmed the Board's final order concluding that the union did not engage in unfair practices by refusing the employer's demand to bargain the terms and conditions of employment for the newly accreted non-faculty athletic trainers. As recognized by the Examiner, the Board relied on two salient points in concluding that the union possessed a sound arguable basis for believing that the non-faculty trainers were already covered by the existing contract: (1) the non-faculty trainers were accreted into the unit before the contract was executed by the parties and (2) the existence of record evidence that the job duties of the newly accreted employes were substantially similar to employes already included in the unit. Id. at 158. In SSHE II, the Board relied on the SSHE I Court's directive that '"if the duties of non-faculty trainers were substantially similar to those of faculty athletic trainers, then the terms of the CBA would apply and, if not, negotiation of a new contract would apply.'" SHHE II, 821 A.2d at 158 (quoting SHHE I, 800 A.2d at 987-988).

However, both SSHE I and SSHE II are distinguishable from this case. Unlike the SSHE cases, the CBA here was executed one year and five months prior to the accretion of the assistant nurses into the unit by the Board. Also, the record is devoid of evidence demonstrating that the job duties of the assistant nurses are substantially similar to those of the certified nurses. In this regard, the Union merely directs the Board's attention to the fact that there is one certified nurse at each of three schools and there is an assistant nurse at each of three schools. The Union accordingly maintains that this one fact is dispositive that assistant nurses perform similar job functions as the certified nurses. However, this one, inconclusive fact pales in comparison to the extensive record before the Board in SSHE II, which detailed the interchangeability and fungibility of faculty and non-faculty trainers and the extensive similarities between their daily job duties. The courts have consistently approved the Board's long-standing policy requiring the examination of evidence of actual job duties when unit positions are at issue. Washington Township Municipal Auth. v. PLRB, 20 PPER ¶ 20031 (Franklin County Court of Common Pleas, 1988), aff'd, 569 A.2d 402 (Pa. Cmwlth. 1990); PSSU, Local 668 v. PLRB, 740 A.2d 270 (Pa. Cmwlth. 1999); School Dist. of the Township of Millcreek v. Millcreek Educ. Ass'n, 440 A.2d 673 (Pa. Cmwlth. 1982).

The Union failed to present any such evidence in this case to satisfy the requisite standard articulated by the Commonwealth Court in SSHE I and SSHE II. As noted in the Board's final order, issued today in PERA–C-03-61-W, "the District is statutorily required to employ certified nurses, not paraprofessional or assistant nurses. Certified nurses have clearly defined statutory and regulatory responsibilities that are not imposed upon the assistant nurses." PERA-C-03-61-W at 3 (Final Order, May 18, 2004). Accordingly, absent record evidence establishing the actual job duties of the assistant nurses are "substantially similar" to those of the certified nurses, as required by SSHE II, the Board is unable to conclude that the parties contemplated the applicability of the CBA to the assistant nurses such that the Union possessed a sound arguable basis for refusing to bargain with the District the wages, hours and other terms and conditions of

employment for the assistant nurses, especially where the CBA was executed before and not after the assistant nurses were accreted into the unit, as in SSHE I and SSHE II. Absent a sound arguable basis for refusing to bargain, the Union has a statutory duty to negotiate with the District over the wages, hours and other terms and conditions of employment for the assistant nurses. In the Matter of the Employes of Luzerne County Intermediate Unit No. 18, 30 PPER ¶ 30120 (Final Order, 1999); In the Matter of the Employes of Norwin Sch. Dist., 31 PPER ¶ 31104 (Final Order, 2000).

The Union also claims, as does the District in PERA-C-03-61-W, that the parties cannot logically comply with simultaneous orders to arbitrate the grievance and negotiate the terms and conditions of employment for the assistant nurses. The parties are unable, argues the Union, to negotiate a separate contract for assistant nurses with different terms than the existing CBA when an arbitrator could issue an award applying the terms of the CBA to the assistant nurses. The Board's analysis of the identical issue raised by the District in PERA-C-03-61-W is applicable here.

> [T]he law and the policies of PERA require the Board to affirm both the Examiner's decision here and in Case No. PERA-C-03-41-W. The District's obligation to submit to arbitration is mandatory, and the Board routinely directs issues involving the meaning and application of a collective bargaining agreement to the parties' grievance/arbitration procedure. Bald Eagle, supra; Center Township, supra. Regardless of the perceived clarity of the answer to the contractual issue, it is not the Board's role to usurp the role of the arbitrator to interpret the contract, but it is rather the Board's limited role to direct the parties to the forum provided by Section 903 and the contract. Also, the Board has consistently held, with court approval, that the accretion of new employes in an existing bargaining unit may raise the duty to bargain the terms and conditions of employment for those newly accreted employes under appropriate circumstances. SSHE II; In the Matter of the Employes of Luzerne County Intermediate Unit No. 18, 30 PPER ¶ 30120 (Final Order, 1999)(citing Marion Center Educ. Ass'n, No. 2246 C.D. 1998, unreported opinion, (Pa. Cmwlth. 1999)); In the Matter of the Employes of Norwin Sch. Dist., 31 PPER ¶ 31104 (Final Order, 2000). The Board not does premise its decisions based on speculation concerning the potential conclusions of an arbitrator nor does the Board compromise its authority over statutory violations merely because the parties have simultaneous obligations.
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> The District and the Union argue that there cannot be both a duty to bargain and a duty to arbitrate the union's grievance in this circumstance. However, the Board and the courts have recognized that the same conduct may constitute both a claim of violation of a contract and a statutory duty to bargain. York County Hospital and Home v. AFSCME, District Council 89, 426 A.2d 1224 (Pa. Cmwlth. 1981); Commonwealth of Pennsylvania (Venango County Board of Assistance) v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983). Indeed SSHE I and SSHE II are examples of an instance where inclusion of employes whose duties were substantially

> similar to employes already in the unit simultaneously spawned both a grievance claiming the employes were already covered by the contract and a charge of unfair practices by the employer claiming that the employes were not covered by the contract and only a prospective duty to bargain was owed by the employer. Both claims were processed and in separate decisions, after examination of the facts, both the Board and the arbitrator reached consistent results. Here, however, the same contentions are made regarding the merits, but only at an earlier stage of proceedings (before the claim of contract violation is addressed by an arbitrator). Although the parties here are at opposite viewpoints regarding the appropriate outcome, both positions have the right to be aired and addressed. The Board possesses a duty to enforce both statutory obligations as required by the case law applicable to both charges. Accordingly, this exception is dismissed.

(PERA-C-03-61-W, Final Order, May 18, 2004).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

**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 filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member and Anne E. Covey, Member, this eighteenth day of May, 2004. 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

Indiana Area Education Association hereby certifies that it has ceased and desisted from its violation of Section 1201(b)(3) of the Public Employe Relations Act; that it has made an offer to the Indiana Area School District (District) to bargain the wages, hours and other terms and conditions of employment for school nurse assistant RNs; that it has posted a copy of the proposed decision and order as directed therein; that it has posted a copy of the Final Order of the Board in the same manner; and that it has served a copy of this affidavit on the District at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

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Signature of Notary Public