

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LAKE LEHMAN EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION :
 : Case No. PERA-C-04-416-E
v. :
 :
LAKE LEHMAN SCHOOL DISTRICT :

FINAL ORDER

On April 6, 2006, the Lake Lehman School District (District) timely filed exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated March 17, 2006. In the PDO, the Hearing Examiner found that the District engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally assigning bargaining unit food preparation work at special events to non-unit employes.

The Lake Lehman Educational Support Personnel Association (Union) is the certified exclusive bargaining representative of a unit of District employes that includes the cafeteria employes. The term of the current collective bargaining agreement (CBA) is from July 1, 2003, through June 30, 2008. The District operates four school buildings each of which has a cafeteria and a contiguous kitchen. The food preparation, cooking, display and clean-up are performed by bargaining unit employes. However, the District contracts with Nutrition, Inc. to manage those services. Since at least 1982, the District has hosted special events during which bargaining unit employes utilized the cafeteria kitchen at the high school to prepare and serve food. The special events have included the following: In-service days for teachers; craft shows; parent-teacher meetings; Ring Day for seniors; and back-to-school nights. Historically, the District has consistently followed the union seniority list to call in unit members to work these special events in the cafeteria kitchen. Pursuant to the CBA, the District pays bargaining unit employes at the hourly rate of time-and-one-half to work special events.

On July 13, 2004, following the installation ceremony for the District's new superintendent, the District hosted a reception in his honor in the high school cafeteria. Three non-unit individuals, at least two of whom were Nutrition, Inc. management employes, prepared food trays in the school kitchen. These employes were in the kitchen preparing food trays and utilizing the kitchen equipment. No bargaining unit personnel worked the event. Prior to the reception, Nancy Stark, a bargaining unit employe at the high school, called Mary Kary Bukeavich, the Nutrition, Inc. manager, to inquire if she would be needed to work the reception, but Ms. Bukeavich did not respond to Ms. Stark. Nutrition, Inc. submitted a "special function" invoice to the District for the event indicating that 150 persons were served at \$3.00 per person for a total of \$450. The food supplied was assorted gourmet cheese and crackers with pepperoni and dip, fresh fruit display, gourmet cookies, fresh vegetables, coffee, tea, bottled water and assorted bottled teas.

In its exceptions, the District incorporates by reference its post-hearing brief and claims that the Examiner erred by concluding that the District engaged in unfair practices by transferring the bargaining unit work of using the high school kitchen facilities to provide food services at special events. Specifically, the District argues that the work in question was not exclusively performed by the bargaining unit.

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992)(emphasis original). In establishing an unfair practice for the removal of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). City of

Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra).

In its post-hearing brief, the District argues that "[t]he record in the case sub judice clearly establishes that there was no exclusivity in favor of the Complainant." (District's Post-hearing brief at 2). The District contends that the cafeteria has been used for the dispensation of food and beverages on multiple occasions, without the use of bargaining unit members, including the annual Humanities dinner, the Lehman-Jackson annual holiday play, the annual donkey basketball game and the girls basketball post-game reception. The Union, however, clearly established on the record that the District utilizes the high school cafeteria for the following two different types of food service events: (1) Events hosted and provided by the District; and (2) Events where the school cafeteria is merely a venue for events hosted and provided by third parties. The events relied upon and named by the District in support of its position clearly fall within the latter category, i.e., events hosted and provided by third parties. In contrast, the reception at issue here was an event operated and paid for by the District, which created an overtime opportunity for bargaining unit employes. The District's contract with Nutrition, Inc. for the management of the cafeteria was not license to arrange with the contractor for their performance of bargaining unit work, which under prior relevant circumstances had previously been performed by employes in the bargaining unit.

The Union established that the bargaining unit members exclusively perform, and therefore developed an interest in retaining, all the food preparation work at special events hosted, paid and provided by the District. In this case, when the District hosted and provided the reception for its newly hired superintendent and utilized and paid its management contractor employes to provide food preparation services for that District provided event, it unilaterally altered the manner in which it assigned bargaining unit work, which constitutes an unfair practice. AFSCME, supra; City of Jeanette, supra; Wyoming Valley, supra. Although the food preparation provided by Nutrition, Inc. was minimal and included, fresh vegetables and dip, cheese and crackers, fruit cup and coffee and tea, the fact remains that the food was provided and prepared at the behest of and paid for by the District at a special event.

The District alternatively argues that it was contractually privileged to unilaterally subcontract with non-unit workers to prepare food at the District's reception for the superintendent under Article VIII of the CBA. In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M. 1516 (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER ¶ 28200, at 433 (Final Order, 1997). The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlth. 2000). "The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained for agreement, for the claim that the employer's action was permissible under the agreement." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a 'sound arguable basis' for its interpretation and a 'substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, the Board "will not enter the dispute to serve the function of

arbitrator in determining which party's interpretation is correct.'" Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

Article VIII of the parties' CBA provides, in relevant part, the following:

. . . .

B. Food Service Personnel

The normal work year for all full-time and regular part-time food service personnel will be one (1) day more than the total number of student days."

(F.F. 13)(emphasis added). The District maintains that this provision demonstrates that the parties already bargained the granting of authority to the District to use non-bargaining unit workers to perform bargaining unit work after the bargaining unit employes were employed for 181 days of the school year calendar. The District argues that, since the superintendent's reception occurred in July of 2004, that special event occurred beyond the 181 days that comprise the contractual work year for the bargaining unit employes for the 2003-2004 school year. However, the District's proposed interpretation is neither sound nor reasonable.

The District's prior conduct is inconsistent with its argument. Finding of Fact No. 7 discloses that cafeteria employes have worked more than just "student days" identified in the contract. Accordingly, anytime the bargaining unit members work those days, they are already accumulating work days above the 181 day limitation claimed by the District to exist.

Additionally, although neither party raised an issue regarding the relief ordered by the Examiner, Section 1303 of PERA grants broad authority and discretion to the Board to fashion appropriate remedies for unfair labor practices. Section 1303 provides that, having found an unfair practice, the Board shall "cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such reasonable affirmative action . . . as will effectuate the policies of this act." 43 P.S. § 1101.1303(emphasis added). Normally in an instance where an employer has committed an unfair practice which deprives employes of pay or benefit, the usual remedy is direction to restore the status quo ante and to make employes whole for losses resulting from unfair practices. Appeal of Cumberland Valley Sch. Dist., 483 Pa. 134, 394 A.2d 946 (1978). Accordingly, the relief ordered by the Examiner on page 6 of the PDO paragraph 3(b) will be modified to direct that the District provide make-whole relief directly to the affected employes instead of the Union as directed in the PDO.

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

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the District 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, as modified, is hereby made absolute and final.

IT IS FURTHER ORDERED AND DIRECTED

that the order set forth in the proposed decision and order shall be modified to direct that the District shall:

1. Cease and desist from interfering with restraining or coercing employees 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 an employe representative which is the exclusive representative of employes in the appropriate unit including but not limited to the discussion of grievances with the exclusive representative.

3. Take the following affirmative action:

(a) Post a copy of this Final 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;

(b) Make whole the affected bargaining unit employes by paying them a sum of money they would have earned under the collective bargaining agreement by working the July 13, 2004 reception;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached affidavit of compliance upon the Lake Lehman Educational Support Personnel Association.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this sixteenth day of May, 2006. 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.

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

Lake Lehman School District (District) hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Act; that it has posted a copy of the Final Order as directed therein; that it has made the affected employes of the bargaining unit whole by paying them a sum of money equivalent to the wages that would have been earned by them if the District had not diverted that work from the bargaining unit; and that it has served a copy of this affidavit on the Lake Lehman Educational Support Personnel Association.

Signature/Date

Title

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

Signature of Notary Public