COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

REYNOLDS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-05-543-W
REYNOLDS SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On November 22, 2005, the Reynolds Educational Support Personnel Association, PSEA/NEA (Association), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Reynolds School District (District) had violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (Act) "by assigning bargaining unit work to non-bargaining unit employees." "Specifically," according to the Association, the District "eliminated food cafeteria monitor positions, which were in the support staff unit, and has assigned teachers, from the professional unit, to monitor the cafeteria."[1] On December 21, 2005, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on March 10, 2006, if conciliation did not resolve the charge by then. The hearing was held as scheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On May 2, 2006, the Association filed a brief by mail. On May 4, 2006, the District filed a brief by mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On December 24, 1990, the Board certified the Association as the exclusive representative of a bargaining unit that includes custodians, secretaries, teacher aides and food service workers employed by the District. (Case No. PERA-U-90-767-W)

2. In 1999, the District assigned food service workers to work as monitors in a cafeteria. Among other things, the food service workers checked if students had three items on their trays, opened milk cartons and straws for students, made sure students sat at the right tables, answered questions from students, excused students to the rest rooms, accompanied K-3 students to the rest rooms, kept track of students, cleaned up spills, placed misbehaving students at a table against the wall and reported the misbehavior to teachers for the imposition of discipline as needed. (N.T. 5-10, 26, 32-34, 37-39; Association Exhibit 1, District Exhibit 1)

3. At the end of the 2004-2005 school year, the District furloughed two food service workers working as monitors in the cafeteria. (N.T.10)

4. At the beginning of the 2005-2006 school year, the District assigned teachers to work as monitors in the cafeteria. The teachers have checked if students had three items on their trays, opened milk cartons and straws for students, made sure students sat at the right tables, answered questions from students, excused students to the rest rooms, accompanied K-12 students to the rest rooms, kept track of students, cleaned up spills and placed misbehaving students at a table against the wall. (N.T. 10-12, 28)

5. The District did not bargain with the Association over the performance of that work by the teachers. (N.T. 34)

[1] In addition, the Association alleged that "[t]eachers are also now required to perform additional duties previously performed by the support unit, including monitoring of breakfast which is being packed in bags and given to students to eat in their classrooms rather than in the cafeteria." The Association did not prosecute that allegation at the hearing or argue it in its brief, so that allegation will not be addressed. SSHE, 32 PPER ¶ 32118 (Final Order 2001)(an argument not made to a hearing examiner is waived).

DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act "by assigning bargaining unit work to non-bargaining unit employees." "Specifically," according to the Association, the District "eliminated food cafeteria monitor positions, which were in the support staff unit, and has assigned teachers, from the professional unit, to monitor the cafeteria."

The District contends that the charge should be dismissed for lack of proof that the teachers are performing bargaining unit work.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally transfers bargaining unit work to non-members of the bargaining unit. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). The charging party has the burden of proving unfair practices by substantial evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). "'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229.'" PLRB v. Kaufman Department Stores, Inc., 345 Pa. 398, 400, 29 A.2d 90, 92 (1942).

A close review of the record reveals that the District unilaterally transferred bargaining unit work to non-members of the bargaining unit. As set forth in the findings of fact, in the absence of bargaining with the Association, the District assigned teachers, who are not in the bargaining unit, to perform work that food service workers in the bargaining unit had been performing on an exclusive basis for a number of years. Thus, it is apparent that the District committed unfair practices under sections 1201(a)(1) and 1201(a)(5). Mars Area School District, supra.

In support of its contention that the charge should be dismissed for lack of proof that the teachers are performing bargaining unit work, the District submits that the record may be searched in vain for substantial evidence that the teachers are performing bargaining unit work. The District points out that the food service worker who appeared as the Association's only witness (Carol Reeher) testified on direct examination at N.T. 11 as follows:

> "Q Previously, when the District had cafeteria monitors, when you were a cafeteria monitor, did anyone else monitor the students?
>
> A No.
>
> Q Now the teachers are doing it?
>
> A Correct."

The District also points out that Ms. Reeher testified on cross-examination at N.T. 15 as follows:

> "Q. And would you agree that teachers do not perform a lot of duties that are on [the cafeteria monitor's] job description.
>
> A. That's correct."

In the District's view, because Ms. Reeher did not explain what the phrase "monitor the students" means, her testimony on direct examination is too conclusory to be substantial evidence that the teachers are performing bargaining unit work. The District also posits that Ms. Reeher's testimony on cross-examination shows that the teachers are not performing bargaining unit work.

In focusing on the direct examination quoted above, however, the District overlooks that Ms. Reeher previously testified to the particular work she performed working as a monitor in the cafeteria (N.T. 5-10). Taken as a whole, then, her testimony on direct

examination is substantial evidence that the teachers are performing bargaining unit work. Moreover, her testimony on cross-examination that teachers are not performing a lot of the duties on the cafeteria monitor's job description hardly proves that they are not performing any of them.

In further support of its contention that the charge should be dismissed for lack of proof that the teachers are performing bargaining unit work, the District submits that the monitoring of students was a small part of the work performed by the food service workers. The District points out that its superintendent (Maddox B. Stokes) testified that among the "main functions" of the food service workers working as monitors in the cafeteria was the recording of student lunch purchases (N.T. 26), that its former administrative assistant to the superintendent for child accounting, food service and transportation (Karen Sherwood) testified similarly (N.T. 38-39) and that the record shows that the recording of student lunch purchases is now being performed by a scanning system (N.T. 6, 10, 12-13, 29). In City of Harrisburg, 605 A.2d 440 (Pa. Cmwlth. 1992), however, the court held that an employer is obligated to bargain over the transfer of "any" bargaining unit work to non-members of the bargaining unit. 605 A.2d at 442 (emphasis in original). Whether or not the monitoring of students was a small part of the work performed by the food service workers is, therefore, irrelevant. The fact that a scanning system is recording student lunch purchases is irrelevant, too, because the record shows that the teachers are performing bargaining unit work nevertheless.

In further support of its contention that the charge should be dismissed for lack of proof that the teachers are performing bargaining unit work, the District would have the Board find that the teachers are teaching students discipline and that the food service workers have never performed that work. The District points out that Superintendent Stokes testified that "[p]unishment is not the same as discipline" in that discipline involves the teaching of an understanding on the part of students that they are "responsible for their own internal locus[] of control" while punishment does not (N.T. 24-25), that the food service workers only imposed punishment when they placed misbehaving students at a table against the wall (N.T. 25) and that it assigned the teachers to replace the food service workers to "weave the teaching of discipline into what is happening in the classroom during the school day" (N.T. 28-29). The District also points out the record shows that teachers are trained to teach students discipline while the food service workers are not (N.T. 12, 16-19, 23-24, 29, 39) and that it would be difficult to train the food service workers to teach students discipline because cafeteria monitoring is an entry level position with a high turnover rate (N.T. 14-15, 27-28, 30, 39-40). The District finally points out that the teachers are professional employes under section 301(7) of the Act while the food service workers are not and that it has the managerial right under section 702 of the Act to direct its employes.

To the extent that the teachers are teaching students discipline by imposing discipline as needed, the record shows that the teachers are not performing bargaining unit work. As set forth in finding of fact 2, the food service workers have always referred misbehaving students to teachers for the imposition of discipline as needed, so it is apparent that the imposition of discipline is not bargaining unit work. Commonwealth of Pennsylvania, 29 PPER ¶ 29148 (Final Order 1998)(the performance of non-police work is not the performance of police bargaining unit work). As also set forth in finding of fact 2, however, the record shows that the food service workers have always checked if students had three items on their trays, opened milk cartons and straws for students, made sure students sit at the right table, answered questions from students, excused students to the rest rooms, accompanied K-3 students to the rest rooms, kept track of students, cleaned up spills and placed misbehaving students against the wall. Thus, to the extent that the teachers are teaching students discipline by performing that work, the record shows that the teachers are performing bargaining unit work (finding of fact 4).

In reaching this result, it is noted that the focus in a charge of this nature is on the work performed by the employes involved, Mars Area School District, supra, so the fact that the teachers are professional employes under section 301(7) while the food service workers are not is irrelevant. It also is noted that while the District has the

managerial right under section 702 to direct its employes, it had no right to unilaterally assign teachers to the cafeteria to perform bargaining unit work. Id.[2]

CONCLUSIONS

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

1. The District is a public employer under section 301(1) of the Act.

2. The Association is an employe organization under section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The District has committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering with, 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 an employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action:

a. Rescind the transfer of bargaining unit work to the teachers;

b. Reinstate that work to the bargaining unit;

c. Submit in writing to the food service workers furloughed at the end of the 2004-2005 school year offers of reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them and make them whole for any loss of pay they suffered from the date they were furloughed up to the date of the unconditional offers of reinstatement;

d. The backpay due shall be computed on the basis of each separate calendar quarter or portion thereof during the period stated above. The quarterly period shall begin with the first day of January, April, July and October. The pay shall be determined by deducting from a sum equal to that which they normally would have earned for each quarter or portion thereof earnings which they actually earned or with the exercise of due diligence would have earned in other employment, earnings which they would have lost through sickness and any unemployment compensation received by him. If the District claims lack of due diligence, it shall be obligated to establish that there was substantially equivalent employment reasonably available and that due diligence was not exercised to find interim employment. Earnings in one particular quarter shall have no effect on the liability for any other quarter;

[2] Although not dispositive, it is noted that the Association contends that the reason the District gave for assigning the teachers to the cafeteria is suspect. Noting that the teachers the District assigned to the cafeteria are not regular classroom teachers who are with students on a regular basis but special teachers who are only with the students on a part-time basis (N.T. 31, 42-45), the Association posits that if the District really wanted to teach students discipline, it would have assigned classroom teachers to the cafeteria. The wisdom of an employer's exercise of a managerial right is, however, of no concern to the Board. Bangor Area School District, 33 PPER ¶ 33088 (Final Order 2002).

e. Post a copy of this decision and order within five 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 consecutive days; and

f. Furnish to the Board within twenty days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of May 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

Direct Dial
717-783-6025

Fax Number
717-783-2974

May 18, 2006

Todd C. Park, Esquire
PA STATE EDUCATION ASSOCIATION
3033 New Butler Road
New Castle, PA 16101-3236

Charles E. Steele, Esquire
STEELE LAW OFFICE
Park Building
355 Fifth Ave. Suite 400-3
Pittsburgh, PA 15222

REYNOLDS SCHOOL DISTRICT
Case No. PERA-C-05-543-W

Enclosed is a copy of the proposed decision and order that I have issued this date.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Lewis P. McEwen
Maddox B. Stokes