

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 :

PROPOSED DECISION AND ORDER

On September 7, 2004, the Lake Lehman Educational Support Personnel Association (Association or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Lake Lehman School District (District or Respondent) alleging the District violated Section 1201 (a)(1) and (5) of the Public Employe Relations Act (Act).

On December 3, 2004, 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 seeking resolution of the matters in dispute through mutual agreement of the parties and February 7, 2005, in Wilkes-Barre was assigned as the time and place of hearing, if necessary.

The hearing was necessary but was continued to February 15, 2005 and held before Thomas P. Leonard, Esquire, a hearing examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

Post-hearing briefs were filed by the Association on April 18, 2005 and by the District on April 22, 2005.

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. That Lake Lehman School District is a public employer within the meaning of Section 301(1) of the Act with its address located at P.O. Box 38, Lehman, Pennsylvania 18702-0038.
2. That Lake Lehman Educational Support Personnel Association is an employe organization within the meaning of Section 301(3) of the Act with its address located at c/o Pennsylvania State Education Association, 1188 Highway #315, Wilkes-Barre, Pennsylvania 18702-6929.
3. That the Association is the exclusive representative of the nonprofessional employes of the district, a unit that includes the cafeteria employes, and has negotiated several collective bargaining agreements with the District for the unit. (N.T. 8)
4. That the District provides educational services at four buildings: a high school building and three elementary buildings: Lake-Noxen, Lehman-Jackson and Ross. (N.T. 30)
5. That each building has a cafeteria and kitchen. (N.T. 34, 61, 68)
6. That the District contracts with Nutrition, Inc. to provide the management services for food service work. The food preparation and service work is done by Association members. (N.T. 8-10, 13, 33, 56)

7. That in addition to the usual school lunches for the students, the District holds special events in which the cafeteria kitchen was utilized by bargaining unit employes to prepare and serve food. The special events include in service days for teachers, craft shows, parent-teacher meetings, Ring Day for seniors and back to school nights. That the District has followed this practice since at least 1982. (N.T. 13-16, 22, 28, 26-37, 64-65, Association Exhibit 3)

8. That the District follows the union seniority list to call in unit members to work these special events in the cafeteria. The District pays these employes at a time and a half rate, pursuant to the collective bargaining agreement. (N.T. 15-16, 22, Association Exhibit 3)

9. That on July 13 2004, immediately after the installation ceremony for the District's new superintendent, Michael J. Healey, the District hosted a reception in his honor in the cafeteria. Three non-unit people, at least two of whom were Nutrition, Inc. management employes, worked the special event. These employes were in the kitchen preparing food trays and utilizing the kitchen equipment. No bargaining unit personnel worked the event. (N.T. 21-22, 53, 69, 71 Association Exhibit 2)

10. That bargaining unit employes did not work at the superintendent's 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 Bukeavich never returned her call. (N.T. 35-36)

11. That 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. There was no charge for labor. 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. (N.T. 50, 53, District Exhibit 2)

12. That the Association and District are parties to a collective bargaining agreement effective July 1, 2003, through June 30, 2008. (N.T. 8, 53, Association Exhibit 1)

13. That the collective bargaining agreement contains a provision at Article VIII, Hours and Wages,

"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."

(N.T. 8, 53, Association Exhibit 1)

DISCUSSION

The Association's charge of unfair practices alleges that the District unilaterally transferred bargaining unit work in violation of Sections 1201(a)(1) and (5) of the Act by unilaterally contracting with a private company to prepare and serve food at a reception following the installation of the new superintendent.

The use of non bargaining unit persons to do bargaining unit work is an unfair practice. In PLRB v. Mars Area School District, 480 Pa. 295, 389 A. 2d 1073 (1978), the Pennsylvania Supreme Court recognized the principle that a public employer commits an unfair practice in violation of Section 1201(a)(1) and (5) where it unilaterally transfers bargaining unit work outside of the bargaining unit. Since then, in numerous cases, involving a variety of factual settings, the Board and the courts have affirmed the principle. See, e.g. Minersville School District, 475 A.2d 962 (Pa. Cmwlth. 1984)(cafeteria services); Bristol Township School District, 24 PPER ¶ 24026 (Final Order, 1993) (summer school psychologists); Lower Dauphin School District, 19 PPER ¶ 19195 (Final Order, 1988)(transportation services).

The transfer of bargaining unit work is a mandatory subject of bargaining, even if the transfer of work has a de minimis impact on the bargaining unit. City of Philadelphia, 25 PPER ¶ 25034 (Final Order, 1994). As our Commonwealth Court stated in City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). "a public employer commits an unfair labor practice when it unilaterally transfers any unit work to non-members without first bargaining with the unit." 605 A.2d at 442. (emphasis in original). Even a change in the pattern by which members and non-members of a bargaining unit have performed the same work is bargainable. AFSCME v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)

Here, the facts show that the District unilaterally assigned non bargaining unit employees to do bargaining unit work. Specifically, the Association proved that the District used the private food services contractor to prepare food and serve the guests at a reception for the new superintendent. The Association proved that in the past that it has traditionally performed the work of preparing and serving food at other after-school special events that were similar to the superintendent's reception.

The District raises three defenses to the charge. The first defense is that the work the Association complains about being transferred is not exclusive to the unit, as the "cafeteria has been utilized on numerous occasions by groups approved by the District via its Use of Facilities Form." (District Brief, p. 2) The District points to functions such as the annual Humanities dinner, the annual Lehman-Jackson holiday play, a girls basketball post game reception and the annual donkey basketball game as examples of cafeteria work where the bargaining unit did not work.

The Association correctly points out that these events are different in quality and degree from the superintendent's reception. The District and the Association have an established manner of recognizing these events as outside the scope of bargaining unit employment. Special events, where food is prepared using the kitchen and then served to the guests, are another matter. The reception for the superintendent is such a special event, and the fact that the District used the private food service to prepare the food in the kitchen is what triggered the present charge.

The Association showed that the humanities dinner has always been conducted entirely by students. The students make dishes from foreign lands they are studying. The result is an international buffet, an event that is intrinsically part of the curriculum. The food served at the Lehman-Jackson holiday play amounts to cookies and punch and has always been arranged by the PTA. The food served at the girls' basketball game is brought in already prepared by the families of the players. At the annual donkey basketball game, the students and their supervisors or advisors bring crock pots or warmers and serve that food, along with sandwiches and drinks, from the back of the cafeteria. These events were significantly different in kind and quality than the other after school special events that the Association has worked. AFSCME v. PLRB, supra.

The second defense is that the District was not on notice that the use of the kitchen was a distinctive element of the Association's claim of the transferred work. The District complains that the specification of charges allege the violation took place in the cafeteria while the proof produced at the hearing showed that the distinction the Association makes is work that involves food preparation in the kitchen. This defense will be dismissed. The District was on notice that the issue was the transfer of the work of "preparing and serving food," as set forth in the Association's specification of charges. The Association's use of the kitchen for food preparation is a subset of cafeteria work, and to this the Association has limited its complaint.

The District seems to have been prepared for a hearing that would discuss any and all food preparation and service that occurred in or near the cafeteria because it developed a list of cafeteria work, District Exhibit 1.

The third defense is that the event took place in July, when school was not in session, and by that date the food service workers had been employed for 181 days, the normal work year, "during the 2003-2004 school year." The District argues that this work was outside the contractually mandated time and thus was contractually privileged. In

Jersey Shore Area School District, 18 PPER 18061 (Proposed Decision and Order, 1987), 18 PPER 18117 (Final Order, 1987), this Board adopted the sound arguable basis test as set forth in NCR Corp., 271 NLRB 1212, 117 LRRM 1062 (1984): When an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the [NLRB] will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct. 18 PPER at 175. Essentially when an employer can point to a contractual provision, specifically on point to the issue in dispute, and it is plainly apparent that the language in dispute has two, likely interpretations, the Board will not choose which is the correct interpretation, but rather conclude that the employer has a sound arguable basis for its decision and subsequent action. Jersey Shore Area School District, supra.

The District contends that it has complied with the following CBA provision, found at Article VIII, Section 1(B) "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". The District argues that the food service personnel were afforded 181 days of employment during the 2003-2004 school year, one more than total of student days. The District's third defense will be dismissed. It would be inappropriate to apply this defense in the present case because the July 13, 2004 superintendent's reception took place in a new school year, even before the students arrived in September. It is not apparent that this provision of the CBA would have been triggered by going back and using the days worked for the 2003-2004 school year.

CONCLUSIONS

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

1. That Lake Lehman School District is a public employer within the meaning of Section 301(1) of the Act.
2. That Lake Lehman Educational Support Personnel Association is an employe organization within the meaning of Section 301(3) of the Act.
3. That the Pennsylvania Labor Relations Board has jurisdiction over the parties hereto.
4. That Lake Lehman School District has committed unfair practices in violation of Sections 1201(a)(1) and (5) of the Act.

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 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 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 Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employees and have the same remain so posted for a period of ten (10) consecutive days;

(b) Make whole the bargaining unit by paying the Association a sum of money equivalent to the wages that would have been earned by bargaining unit employees if the District had called them to work at the July 13, 2004 reception;

(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 Association.

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 seventeenth day of March, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

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 proposed decision and order as directed therein; that it has made whole the bargaining unit by paying the Association a sum of money equivalent to the wages that would have been earned by bargaining unit employees if the District had called them to work at the July 13, 2004 reception and that it has served a copy of this affidavit on the Association 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

March 17, 2006

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LAKE LEHMAN SCHOOL DISTRICT
Case No. PERA-C-04-416-E

Enclosed please find a copy of the proposed decision and order issued this date in the above-captioned matter.

Sincerely,

THOMAS P. LEONARD
Hearing Examiner

cc: Lake Lehman School District