

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

WYOMING AREA EDUCATIONAL SUPPORT :  
PERSONNEL ASSOCIATION :  
 :  
v. : Case No. PERA-C-06-247-E  
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 :  
WYOMING AREA SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On June 5, 2006, the Wyoming Area Educational Support Personnel Association (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Wyoming Area School District (District) alleging that the District violated Sections 1201(a)(1), (3) and (5) of the Public Employee Relations Act (Act).

On August 18, 2006, 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 resolving the matters in dispute through the mutual agreement of the parties and November 6, 2006, in Wilkes-Barre was scheduled as the time and place of hearing if necessary.

A hearing was necessary but was held on October 29, 2007, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

At the hearing, the complaint withdrew the Section 1201(a)(3) allegation.

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 the Wyoming Area School District (District) is a public employer within the meaning of Section 301(1) of the Act. (N.T. 10-11)
2. That the Wyoming Area Educational Support Personnel Association (Association) is an employe organization within the meaning of Section 301(3) of the Act. (N.T. 10-11)
3. That the Association is the exclusive representative of the District's nonprofessional employes, including custodians and maintenance employes. (N.T. 10-11, 51, 75, District Exhibit 1)
4. That the Association and the District are parties to a collective bargaining agreement (CBA) which is effective from July 1, 2004 through June 30, 2009. (N.T. 51, 75, District Exhibit 1)
5. That over the years, the District has directed that custodians or maintenance employes perform checks on the District's buildings on weekends and holiday when the heating system is activated. (N.T. 19, 40, 45, 53-54, 69, 72, Association Exhibit 1)
6. At the secondary center, the work of building checks involves walking through every hallway to verify the heat is on, entering the boiler room to make sure the boiler is not misfiring, checking both sides of the auditorium to make sure that each side's system is working and to make sure no water pipes are leaking. If a problem is discovered, the employe calls his supervisor. (N.T. 34-35, 45)
7. That William Simmons has been employed by the District for 14 years. He has held the position of maintenance foreman for almost twelve years. On the Easter weekend in 2006, Simmons was assigned to the secondary center. (N. T. 14.)
8. While Simmons worked as maintenance foreman at the secondary school, he performed building checks on the building during holidays and whenever the school was closed. When Simmons did the building checks on holidays, he received overtime pay. (N.T. 14-15, 20-21, 57)

9. That Patrick J. (P.J.) Pribula was employed as superintendent of buildings and grounds from 2004 through 2006. Pribula's duties included overseeing the operations of all physical plant activities and staff. Pribula supervised Simmons. (N.T. 38)

10. That in 2006 the District contracted with a private renovation company, CM3, to do substantial renovation work on the secondary center. The work involved some weekends when school was not opened. (N.T. 27, 62-63)

11. That for the Easter, 2006 weekend, Superintendent Raymond Bernardi directed Pribula and building and grounds manager Carl Yorina, to split the building checks for the four days that weekend. Because of a conflict, Yorina could not do the work, so Pribula did building checks all four days. (N.T. 40)

12. Pribula informed Simmons that Pribula would be performing the building checks and that it was no longer necessary for Simmons to perform the building checks. When Simmons asked Pribula why Simmons was no longer perform building checks, Pribula responded by letter two or three days later that even though the support staff performed building checks in the past, this task had now been assigned to Pribula by the Superintendent. (N.T. 17, 18, Association Exhibit 1)

13. Pribula did the building checks on four days over the Easter 2006 break. Pribula was not a member of the bargaining unit at that time. (N.T. 40)

14. That the private renovation company, CM3, was doing renovations on the toilets and plumbing in the secondary center over Easter weekend. (N.T. 73)

15. The renovation company was not in the school on all four days of the Easter weekend, but only on Easter Monday. (N.T. 70-71)

16. That Dale Swanek, a custodian and bargaining unit member, was on duty as a custodian at the secondary center on two of the four days of the Easter 2006 weekend, Holy Saturday and Easter Sunday. (N.T. 46-47, 69)

#### DISCUSSION

The Association's charge of unfair practices alleges that the District violated Sections 1201(a)(1) and (5) by unilaterally transferring the bargaining unit work of performing building checks to a supervisor over the Easter weekend in April, 2006.

In the present case, the work of building checks on holidays has historically been performed by bargaining unit employes. This factual determination is based on the credible testimony of William Simmons, who was assigned to the secondary center in 2006. Over the Easter weekend of 2006, the superintendent assigned building check work to a supervisor who was not in the bargaining unit.

The District attempted to minimize the weight of Simmons' testimony that he had historically performed building checks on holidays by producing payroll records showing that for the last six Easter weekends Simmons never received overtime for Easter weekend building check work. (District Exhibit 2) While this document speaks to Simmons' Easter weekend work, it does not address the overall thrust of the Association's case, that when the District management assigned building checks on holidays, they called bargaining unit employes such as Simmons. From District Exhibit 2, the only thing that can be reasonably inferred is that there were some Easter weekends when supervisors exercised their discretion to call no one, including Simmons, to do building checks.

Furthermore, the work of building checks is not personal to Simmons. It is bargaining unit work. As acknowledged by Pribula, the bargaining unit has always done the building check work. It is undisputed that the District exercised its discretion to perform building checks on Easter weekend of 2006 and assigned this work to persons outside the bargaining unit.

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).

In its defense, the District makes three arguments why it should not be found to have committed an unfair practice.

The first argument is that the assignment of non-bargaining employees to do the building checks only occurred on this one occasion due to special circumstances. 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). Accordingly, this argument is dismissed.

The District also argues contractual privilege, i.e. that there is a sound arguable basis in the collective bargaining agreement that there are only certain days that building checks must be done and that the District is under no obligation to pay employees overtime to perform building checks on other days. See Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order, 1987). The District points to the CBA language in Article X, Paid Vacations, "On Christmas Eve, New Year's Eve and the on the first day of deer season all buildings are to be checked by an assigned employee. If conditions warrant, as determined by the employee's supervisor that the employee remain on the job, he shall be compensated at the rate of one and one-half (1 1/2) times his hourly pay for the hours actually worked." (Dist. Ex. 1, Art. X, § A.).

These are not words of limitation but rather words of a mandate to the Association that their members must perform building checks to guarantee that the heating system will be operable and not use these important holidays as an excuse not to do the work. It is reasonable that the parties would codify the mutual obligations on these holidays when a potential catastrophe could occur from a combination of cold weather and employees' desire to spend time with family and friends. But the codification of the mutual obligations of the parties for these three days does not change the fact, as discussed above, that the District has developed a practice giving management the discretion to call out bargaining unit employees for building checks on other holidays. When management exercises such discretion, the longstanding past practice has been to assign building check work to support staff. Accordingly, this argument is dismissed.

Finally, the District argues that no unfair practice should be found because the work of performing building checks is the dual responsibility of bargaining unit and non-bargaining unit employees. In such situations where the work at issue is not exclusive to the bargaining unit, the Board will not find a transfer of bargaining unit work. City of Jeanette v. Labor Relations Board, 890 A.2d 1154 (Pa. Cmwlth. 2006). The District argues that during the Easter 2006 weekend, supervisor Pribula was doing a building check as part of his normal duties of monitoring the subcontractor's renovation work. However, the legal principle of dual responsibility is not applicable in the present case, because the work of building checks performed by bargaining unit employees is distinctly separate from the work of the supervisor monitoring a building renovation project, an unusual event in itself. Also, on three of the four days of the Easter weekend, the renovation contractors were not in the building, which removes the justification that Pribula was in the building to monitor the contractors. Furthermore, Pribula testified credibly that the District never told him why he was to do building checks over the Easter holiday when the renovation contractors were not there, which would take away the District's argument that Pribula was there as part of his work to monitor the renovation work. Accordingly, this argument is dismissed as well.

The District will be found to have violated PERA by unilaterally assigning non-bargaining unit employes the work of performing building checks. To remedy this unfair practice, in addition to usual cease and desist remedy, the District should pay William Simmons the wages he would have earned doing a building check on the two days of the Easter weekend, 2006 when Dale Swanek was not at the secondary center, Good Friday and Easter Monday.

#### CONCLUSIONS

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

1. That the District is a public employer within the meaning of Section 301(1) of the Act.
2. That the Association is an employe organization within the meaning of Section 301(3) of the Act.
3. That the Board has jurisdiction over the parties hereto.
4. That the District has committed unfair practices in violation of Section 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) Pay William Simmons the wages he would have earned for doing building checks at the secondary center on Good Friday and Easter Monday, 2006;

(b) 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 employes and have the same remain so posted for a period of ten (10) consecutive days;

(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 twenty-second day of July, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner