

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE COLLEGE :
AND UNIVERSITY FACULTIES :
v. : Case No. PERA-C-07-488-E
STATE SYSTEM OF HIGHER EDUCATION :
INDIANA UNIVERSITY :

PROPOSED DECISION AND ORDER

On November 17, 2007, the Association of Pennsylvania State College and University Faculties (APSCUF) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the State System of Higher Education (SSHE) violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (PERA) by unilaterally transferring bargaining unit work to a non-member of the bargaining unit at Indiana University of Pennsylvania (IUP). On December 5, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 1, 2008. The hearing examiner thereafter continued the hearing upon the request of APSCUF and without objection by SSHE. On March 27, 2008, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On May 1, 2008, APSCUF filed a brief by deposit in the U.S. Mail. On May 2, 2008, SSHE filed a brief by deposit in the U.S. 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. In 1971, the Board certified APSCUF as the exclusive representative of a bargaining unit that includes employes of SSHE. (Case No. PERA-R-775-C)
2. In 1975, the Board included athletic directors in the bargaining unit. (Case No. PERA-U-5900-C)
3. On January 2, 2007, Ryan M. Smith began working as the assistant director of athletics at IUP. He had been working as the director of intramural facilities and club sports. As the director of intramural activities and club sports, he was a member of a bargaining unit represented by the State College and University Professional Association (SCUPA). (N.T. 31, 33-34, 37, 49)
4. By letter dated January 8, 2007, the interim associate vice president for human resources at IUP (Helen M. Kennedy) wrote to Mr. Smith as follows:

"The classification of your position has been reviewed at the request of Dr. Rhonda Luckey. After careful review of the duties and responsibilities outlined in your current job description, it was determined that a State University Administrator 3 is the appropriate classification level of this position.

Retroactive to January 2, 2007, your position will be reclassified from a State University Administrator 2 to a State University Administrator 3 in the Athletics Department. Your new working title will be Assistant Director of Athletics. The SUA 3 salary is pay range 40, at \$1,757.25 biweekly (\$45,829 annually). Effective January 6, 2007, you will receive a one step service increment that will bring your salary to \$1,801.50 biweekly (\$46,983 annually).

The position to which you are reclassified, SUA 3, remains in the State College and University Professional Association (04) bargaining unit for labor relations purposes. Thus position remains exempt for the purpose of the Fair Labor Standards Act (FLSA).

Congratulations on your reclassification. I wish you continued success at IUP."

(Exhibit 3)

5. As the assistant director of athletics, Mr. Smith monitors IUP's compliance with Title IX, National Collegiate Athletic Association (NCAA) and Pennsylvania State Athletic Conference (PSAC) requirements. (N.T. 37-39, 45, 66-67, 76, 84)

6. Before Mr. Smith became the assistant director of athletics, the associate athletic director/senior woman's administrator/compliance officer at IUP (Frances Nee) monitored its compliance with Title IX, NCAA and PSAC requirements. (N.T. 34, 38-39, 67-68, 76, 84)

7. As the assistant director of athletics, Mr. Smith recruits coaches "from start to finish." (N.T. 39-41, 62, 68-69, 88)

8. Before Mr. Smith became the assistant director of athletics, the athletic director at Indiana University (Dr. Frank Condino) and Ms. Nee recruited coaches "from start to finish." (N.T. 34, 39-40, 62, 68-69, 88)

9. As the assistant director of athletics, Mr. Smith plans fundraising activities and solicits donations to the athletic department for scholarships for student athletes. (N.T. 42-43, 77-78, 87)

10. Before Mr. Smith became the assistant director of athletics, Dr. Condino and Ms. Nee planned fundraising activities and solicited donations to the athletic department for scholarships for student athletes. (N.T. 42-44, 61, 77-78, 87)

11. As the assistant director of athletics, Mr. Smith writes reports for a gender equity committee. (N.T. 46-47, 63-64)

12. Before Mr. Smith became the assistant director of athletics, Dr. Condino or Ms. Nee wrote reports for the gender equity committee. (N.T. 47, 64)

13. As the assistant director of athletics, Mr. Smith fields budgetary questions from coaches, informs coaches of their budgets and oversees the performance evaluation process for coaches. (N.T. 65-66, 71, 73)

14. Before Mr. Smith became the assistant director of athletics, Dr. Condino and Ms. Nee fielded budgetary questions from coaches, informed coaches of their budgets and oversaw the performance evaluation process for coaches. (N.T. 65-66, 73)

15. As the assistant director of athletics, Mr. Smith coordinates planning for the use of IUP's athletic facilities and relays calls for their use to IUP's facility director. (N.T. 62-63, 84-85)

16. Before Mr. Smith became the assistant director of athletics, Dr. Condino and/or Ms. Nee coordinated planning for IUP's athletic facilities and relayed calls for the use of facilities to the facility director. (N.T. 63, 84-85)

17. As the assistant director of athletics, Mr. Smith conducts evaluations of coaches by student athletes. (N.T. 72-73, 89)

18. Before Mr. Smith became the assistant director of athletics, Dr. Condino or Ms. Nee conducted evaluations of coaches by student athletes. (N.T. 73, 89)

19. SSHE did not bargain with APSCUF before Mr. Smith began performing work that Dr. Condino and/or Ms. Lee had been performing. (N.T. 25)

20. On July 30, 2008, APSCUF received a copy of Mr. Smith's job description as the assistant director of athletics. (N.T. 11; Exhibit 3)

21. APSCUF subsequently had reason to believe for the first time that SSHE had transferred bargaining unit work to a non-member of the bargaining unit when Mr. Smith began working as the assistant director of athletics. (N.T. 11-13)

DISCUSSION

APSCUF has charged that SSHE committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the PERA by unilaterally transferring bargaining unit work to a non-member of the bargaining unit at IUP. As set forth in the specification of charges, APSCUF alleges that SSHE

"transferred some of the work of athletic director, associate athletic director and/or assistant athletic director from the APSCUF unit to a person holding the title of assistant athletic director and classified that job within the state university administrators bargaining unit."

SSHE contends that the charge should be dismissed for lack of proof. SSHE also contends that the appropriate remedy for any unfair practice it may have committed should be limited to an order directing restoration of the status quo.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally transfers bargaining unit work to a non-member of the bargaining unit. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). The appropriate relief to remedy unfair practices of that nature would include an order directing restoration of the status quo. Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006), appeal denied, 593 Pa. 730, 928 A.2d 1292 (2007).

As set forth in more detail in the findings of fact, the record shows that SSHE unilaterally transferred work previously performed by two members of the bargaining unit (Dr. Condino and Ms. Nee) to a non-member of the bargaining unit (Mr. Smith). On that record, SSHE must be found in violation of the PERA as charged.

In defense of the charge, SSHE points out that some of the work Mr. Smith performs as the assistant athletic director had not been performed by Dr. Condino or Ms. Nee in the past (N.T. 40, 48, 60, 65, 73-75, 78-80, 82-83). The dispositive inquiry here, however, is whether or not Mr. Smith is performing work that had been performed by Dr. Condino and/or Ms. Nee in the past. The fact that Mr. Smith performs some work that had not been performed by Dr. Condino and Ms. Nee in the past is, therefore, irrelevant. Thus, SSHE has no defense to the charge.

CONCLUSIONS

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

1. SSHE is a public employer under section 301(1) of the PERA.
2. APSCUF is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. SSHE has committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that SSHE shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in article IV of the PERA.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PERA:

(a) Rescind the transfer of bargaining unit work to Mr. Smith.

(b) Reinstate that work to the bargaining unit.

(c) 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; and

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completing and filing 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 thirteenth day of June 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner