

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

NORTH POCONO EDUCATIONAL SUPPORT :  
PERSONNEL ASSOCIATION :  
v. : Case No. PERA-C-06-495-E  
NORTH POCONO SCHOOL DISTRICT :

**FINAL ORDER**

The North Pocono School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on January 30, 2008, challenging a Proposed Decision and Order (PDO) issued on January 10, 2008. In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by unilaterally transferring bargaining unit work to non-unit personnel without prior negotiation with the North Pocono Educational Support Personnel Association (Association). Pursuant to an extension of time granted by the Secretary of the Board, the Association filed a brief in opposition to the exceptions on March 20, 2008.

The facts of this case are summarized as follows. The Association represents the District's nonprofessional employees, including employees in the business office. For at least several years continuing into 2006, the District's payroll work was performed by a payroll clerk who was a member of the nonprofessional bargaining unit. On February 9, 2006, the payroll clerk, Kathryn May, was assigned additional duties as temporary human resources supervisor in addition to her payroll clerk duties. On June 28, 2006, the District's Board of School Directors appointed May to the permanent position of human resources supervisor. However, May continued to do payroll work. The District did not bargain with the Association over the removal of the payroll work from the nonprofessional bargaining unit.

In July 2006, the District posted the position of business office clerk and filled that position in September 2006. The business office clerk is included in the nonprofessional bargaining unit, but does not perform payroll work. In October 2006, the District posted the new position of staff accountant and that position was filled in November 2006. The staff accountant is not included in the nonprofessional bargaining unit. The payroll work previously performed by May as a bargaining unit employee and then as the human resources supervisor is now performed by the staff accountant.

In the PDO, the Hearing Examiner found that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally transferring the payroll work previously performed by the bargaining unit to non-unit personnel without prior negotiation with the Association. In finding an unfair practice, the Hearing Examiner rejected the District's arguments that it did not violate PERA because the bargaining unit did not incur a net loss of positions and the duties of the payroll clerk were allegedly confidential in nature.

In its exceptions, the District argues that the Hearing Examiner erred by (1) failing to apply the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975); (2) finding that the payroll work was bargaining unit work; 3) rejecting the District's "no net loss of positions" argument; and 4) failing to conclude that the confidential nature of the payroll clerk position justified the District's unilateral action.

With regard to the District's first exception, it is well settled that an employer must bargain with the exclusive bargaining representative before transferring bargaining unit work to non-unit personnel. As the Commonwealth Court stated nearly two decades ago in Midland Borough School District v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989), appeal denied, 525 Pa. 651, 581 A.2d 576 (1990):

The PLRB decision, as adopted, pointed out that the employer has not departed from the enterprise of junior and senior high school education but has transferred bargaining unit work without collective bargaining. Such a unilateral transfer is unlawful, even when the transfer is to unpaid volunteers. Pennsylvania Labor Relations Board v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). Continuing to provide a service, by paying an independent contractor to perform it, is an unfair practice when pursued without previous bargaining. Minersville Area School District v. Pennsylvania Labor Relations Board, 82 Pa. Commonwealth Ct. 506, 475 A.2d 962 (1984)(cafeteria services).

560 A.2d at 305.

Midland, Mars and Minersville are part of a long line of Pennsylvania Supreme Court and Commonwealth Court decisions that have uniformly held that the transfer of bargaining unit work to non-members of the unit (e.g., employes of a subcontractor, volunteers, non-unit employes of the same employer) has a greater impact on employe interests than on employer interests and therefore must be bargained. See also Borough of Wilkesburg v. Sanitation Department, 463 Pa. 521, 345 A.2d 641 (1975); Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006), appeal denied, 593 Pa. 730, 928 A.2d 1292 (2007); Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006), appeal denied, 593 Pa. 730, 928 A.2d 1292 (2007); City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006); City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004); Upper Moreland School District v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997), appeal denied, 552 Pa. 698, 716 A.2d 1250 (1998); Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996), appeal denied, 549 Pa. 708, 700 A.2d 445 (1997); City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992); Commonwealth v. PLRB (Ebensburg), 568 A.2d 730 (Pa. Cmwlth. 1990), appeal denied, 527 Pa. 625, 592 A.2d 46 (1991); Commonwealth v. PLRB (Polk Center), 557 A.2d 1112 (Pa. Cmwlth. 1989), appeal denied, 525 Pa. 587, 575 A.2d 117 (1990); City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987).

Given the abundance of precedent requiring employers to bargain over the transfer of bargaining unit work, we find no merit in the District's argument that the Hearing Examiner erred by failing to once again apply the balancing test set forth in State College, *supra*. In the above-cited cases, the Board and the courts have already balanced the employer and employe interests with regard to this same subject matter and have found that the balance tips in the employes' favor and requires bargaining. As the Board stated in Douglass Township Police Officers v. Douglass Township, 36 PPER 160 (Final Order, 2005):

In Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002), the Board opined that it "properly relies on precedent to determine whether a matter constitutes a mandatory subject rather than reinventing the wheel . . . to arrive at the same result as the established precedent" . . . Of course where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such a departure.

36 PPER at 472-473.

Here the District did not introduce new or different facts that may alter the weight the matter at issue bears on the interests of the parties. Therefore, the Hearing Examiner did not err in relying on the well-settled precedent holding that a transfer of bargaining unit work must be collectively bargained.<sup>1</sup>

With regard to the District's second exception, the payroll work was clearly bargaining unit work because it was performed by a member of the nonprofessional unit for at least several years before the District transferred the work out of the unit. City of

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<sup>1</sup> As noted in the District's brief in support of exceptions, an employer may permanently and completely cease provision of a discretionary service without prior negotiation with the employe representative. Youngwood Borough Police Department v. PLRB, 539 A.2d 26 (Pa. Cmwlth. 1988), appeal denied, 522 Pa. 599, 562 A.2d 323 (1989). However, the District did not cease performance of payroll work, but simply transferred the work out of the unit.

Allentown, supra. It is also undisputed that the District acted unilaterally without prior negotiation with the Association. Accordingly, under the authority cited above, the District violated its duty to bargain with the Association.

The District's third exception is also meritless. The Board and the courts have rejected the notion that an employer need not bargain where it removes work from the unit, but does not furlough or terminate bargaining unit employees. Ebensburg; Polk Center; City of Clairton. Rather, where the unit loses work, as here, there is a demonstrable impact on the employees. Accordingly, a bargaining obligation arises over the removal of the work from the unit. Id. Contrary to the suggestion in the District's brief, the Hearing Examiner did not find a duty to bargain over the elimination of the payroll clerk position. An employer has the managerial prerogative to eliminate positions and reassign the work of those positions within the bargaining unit, but may not unilaterally assign the work outside the unit as the District did here. Cornell School District, 13 PPER ¶ 13267 (Final Order, 1982), aff'd, 14 PPER ¶ 14147 (Court of Common Pleas of Allegheny County, 1983).

Finally, the District's claim that the former position of payroll clerk was "confidential" does not excuse its unilateral removal of the payroll work from the bargaining unit. An employer may not unilaterally redefine a bargaining unit by removing positions or work therefrom, but rather must file a petition for unit clarification with the Board. Pennsylvania State Police, supra; Allentown, supra; Clairton, supra. The District did not file a unit clarification petition, and thus committed an unfair practice by unilaterally removing the work from the bargaining unit. Id.

Indeed, even if the District had filed a unit clarification petition, the evidence upon which it relies would not have established that the payroll clerk position was confidential for purposes of Section 301(13) of PERA. Two former payroll clerks testified that the business manager asked them for unspecified financial information that was to be used in negotiations (N.T. 17-20, 25-26). However, to establish that a position is confidential based on an employee's access to information, the party seeking the exclusion must prove that the employee is privy to information of such definite nature that the employer's collective bargaining strategy is revealed and its ability to engage in bargaining is seriously impaired. Tunkhannock Area School District, 29 PPER ¶ 29023 (Final Order, 1997), citing PLRB v. Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978). Mere testimony that the payroll clerk has provided unspecified financial information to the business manager for use in negotiations does not show that the payroll clerk was privy to the employer's collective bargaining strategy, or that the employer's ability to bargain was seriously impaired. Tunkhannock; Western Beaver County School District, 37 PPER 53 (Proposed Order of Unit Clarification, 2006). Thus, even if the District had filed a unit clarification petition before eliminating the payroll clerk position, the evidence upon which it relies would not have supported exclusion of the position from the bargaining unit.

After a thorough review of the exceptions, the briefs in support and in opposition to the exceptions and all matters of record, the Board shall dismiss the District's exceptions and affirm the Hearing Examiner's conclusion that the District committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

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 are hereby dismissed, and the January 10, 2008 Proposed Decision and Order be and hereby is made absolute and final.

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 fifteenth day of April, 2008. 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.

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**AFFIDAVIT OF COMPLIANCE**

The North Pocono School District (District) hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it has rescinded the transfer of the payroll work to non-bargaining unit positions and has reinstated that work to the bargaining unit; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on the Association.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

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Signature of Notary Public