COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| WOODLAND HILLS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION/PSEA/NEA[1] | : | |
| v. | : | Case No. PERA-C-07-452-W |
| WOODLAND HILLS SCHOOL DISTRICT | : | |

**PROPOSED DECISION AND ORDER**

On October 19, 2007, the Woodland Hills Educational Support Personnel Association/PSEA/NEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Woodland Hills School District (District) had violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by transferring bargaining unit work to non-members of the bargaining unit. On November 7, 2007, 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 January 15, 2008, if conciliation did not resolve the charge by then. On November 26, 2007, the District filed an answer denying the allegations of the charge. On January 10, 2008, the hearing examiner, upon the request of the Association and without objection by the District, continued the hearing indefinitely.

On March 19, 2008, the Association filed an amended charge to correct an employe's name and a position's title. On March 27, 2008, the Secretary of the Board issued an amended complaint and notice of hearing assigning the charge as amended to conciliation and directing that a hearing be held on June 3, 2008, if conciliation did not resolve the charge as amended by then. On May 30, 2008, the hearing examiner, upon the request of the Association and without objection by the District, continued the hearing indefinitely.

On September 22, 2008, the Association asked the hearing examiner to reschedule the hearing. On September 24, 2008, the hearing examiner rescheduled the hearing to December 18, 2008.

On December 18, 2008, and March 4, 2009, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On July 6, 2009, the District filed a brief by deposit in the U.S. Mail. On July 7, 2009, the Association 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. On January 6, 2004, the Board certified the Association as the exclusive representative of a bargaining unit comprised of nonprofessional employes of the District. Paraprofessionals and monitors are included in the unit. Confidential employes are not. (Case No. PERA-R-03-439-W)

2. Prior to July 1, 2007, the District employed a member of the bargaining unit (Lee Hricko) as a receptionist in the main office at its administration building. She operated a switchboard to answer phone calls, greeted visitors entering the building, sorted the U.S. and interschool mail, booked the conference room,[2] processed employe absence slips, signed for FedEx and UPS packages, issued passes to senior citizens to attend athletic events free

[1] The caption appears as amended by the hearing examiner to reflect the name of the complainant as set forth in the charge.

[2] The parties presented conflicting testimony as to whether or not Ms. Hricko booked the conference room. The Association presented testimony by her that she booked the conference room when secretaries and administrators called her (N.T. 18), while the District presented testimony by its former superintendent (Dr. Roslynne Wilson) that employes booked the conference room by filling out a log themselves (N.T. 201-202). The conflict in the testimony has been resolved in favor of the Association because Ms. Hricko, having actually performed the duties of the receptionist, was in a better position to know how the conference room was booked than Dr. Wilson was.

of charge, distributed films from the Allegheny Intermediate Unit, relabeled mail bins and compiled a list of employe birthdays. Except for an employe who substituted for Ms. Hricko when she was off from work, no one else performed that work. (N.T. 12-19, 21-22, 24-33, 43, 45-46, 51, 137, 159-160, 164-165, 195-203; Association Exhibits 1, 3-6; District Exhibit 2)

3. For the 2007-2008 school year, the District replaced the switchboard with an automated system, installed an automated system for visitors to enter the building, transferred Ms. Hricko to another bargaining unit position with no loss of pay or benefits and used confidential secretaries to sort the U.S. and interschool mail, book the conference room, process employe absence slips, sign for FedEx and UPS packages, issue passes to senior citizens to attend athletic events free of charge, distribute films from the Allegheny Intermediate Unit, relabel mail bins and compile the birthday list. (N.T. 13-14, 19-33, 42-43, 46, 49-51, 136, 160-166, 198-200; Association Exhibits 2, 21-24, District Exhibit 2).

4. Prior to July 1, 2007, the District employed 14 lunch monitors at its two junior high schools, three intermediate schools and three primary schools. They maintained order in the lunch rooms during breakfast and lunch by lining up students to get meals, directing them back to their seats, taking them out for recess, helping them take off their coats, cut up their food and open their drinks and passing out spoons and ketchup. The District used teachers to perform the same work.[3] (N.T. 53-54, 79-81, 94-95, 136, 139-141, 166-170, 172-175, 299-301, 303-306; District Exhibits 2-3, 10-11)

5. For the 2007-2008 school year, the District furloughed the lunch monitors and used teachers alone to maintain order in the lunch rooms. (N.T. 54, 136, 141, 169, 173-175, 301-302, 306-307; District Exhibit 2)

6. Prior to July 1, 2007, the District employed 14 school monitors at its high school. They took attendance in study halls and the late room for tardy students and made sure that students behaved in the study halls and did not leave the late room. They maintained order in the hallways by making sure that students kept moving between classes, had passes to be in the hallways during classes and did not leave the lunch room during lunch. They recorded the names of students using passes, escorted students to principals for disciplinary action and issued detentions to students who were late to lunch. They checked the bathrooms and the locker rooms for misbehaving students. The District used teachers to make sure that students stayed in the lunch room and to perform hall sweeps to keep students moving in the hallways between classes and from misbehaving in the bathrooms and the locker rooms. The District contracted with Dynasty Security for employes to keep students moving in the hallways between classes and to make sure that they had passes to be in the hallways during classes. The District contracted with Holy Family Learning for four employes to modify as needed the behavior of 15 special education students it assigned to a self-contained classroom known as the essentials classroom. The Holy Family Learning employes followed the special education students in the hallways and to the lunch room. The District expected any adult to help maintain order in the hallways. (N.T. 59-62, 65-69, 71-73, 81-82, 88, 91-92, 97-99, 108, 112, 136, 142-145, 149, 175-178, 204, 209-210, 214-216, 238-242, 244, 246, 255, 259-269, 274-281, 284-286, 290-291, 294-295; Association Exhibit 25, District Exhibit 2, 7 and 9)

7. For the 2007-2008 school year, the District replaced the study halls with academic support and achievement classes known as ASE's that are taught by teachers, furloughed the school monitors, eliminated the essentials classroom and contracted with Holy Family Learning for seven employes. Focusing of the behavior of 35-40 special education students at the high school, the Holy Family Learning employes followed them in the hallways and into the bathrooms and the locker rooms to modify their behavior as needed. The Holy Family Learning employes also took attendance in the late room, made sure that students did not leave the late room and checked students for passes to be in the hallways. Teachers continued making sure that students stayed in the lunch room and

[3] The parties presented conflicting testimony as to whether or not the District used teachers to perform the same work as the lunch monitors. The Association presented testimony by a paraprofessional (Beverly Scott) that teachers were not responsible for anything when the were in the lunch rooms (N.T. 54) and by a lunch monitor (Bonita Cerilli) that teachers were free to leave any time they were in the lunch rooms (N.T. 80-81), while the District presented testimony by Dr. Wilson and an elementary school principal (Karen Bloch) that teachers worked in the lunch rooms as one of their duty assignments (N.T. 140-141, 299-300). The conflict in the testimony has been resolved in favor of the District because Dr. Wilson and Ms. Bloch as its administrators were in a better position to know what the teachers were assigned to do than Ms. Scott and Ms. Cerilli were.

continued performing hall sweeps. Dynasty Security employes continued making sure that students kept moving between classes and had passes to be in the hallways during classes. No one kept a log of students using passes or wrote up detentions for students who were late to lunch. (N.T. 58, 62-64, 67-71, 74-77, 82-83, 86, 88-89, 91-92, 97-98, 109-117, 136, 145-152, 176-180, 183, 204-205, 209-210, 216-218, 232-236, 244-251, 254-255, 268-274, 281-289, 292-293; District Exhibit 2)

8. Prior to July 1, 2007, the District employed 21 paraprofessionals -special education (at large) at its various schools. They worked with teachers who had special education students in their classrooms. They escorted the students to and from their busses, informed the teachers of any behavioral problems the students might be having, modified the classroom behavior of misbehaving students, collected data for behavior plans for the students, scheduled IEP meetings for the students, let the teachers know if the students had enough work to do while in detention and assisted the students in the use of technology. Their focus was on the students' academics. (N.T. 103-108, 137-138, 150-152, 182-186, 205, 207-208; Association Exhibit 26, District Exhibit 2)

9. For the 2007-2008 school year, the District furloughed five paraprofessionals – special education (at large) and used the seven Holy Family Learning employes to modify as needed the classroom behavior of the 35-40 special education students. The District eventually rehired four paraprofessionals - special education (at large). (N.T. 101, 107-110, 112-113, 137-138, 148-149, 152, 171-172, 183-187, 204-207, 209-210, 223-236, 255-256; District Exhibits 2 and 6)

10. The District did not bargain with the Association over the transfer of any bargaining unit work to non-members of the bargaining unit. (N.T. 119-120)

## DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1) and (5) by transferring bargaining unit work to non-members of the bargaining unit. As set forth in the charge, the Association alleges that the District is using non-bargaining unit confidential secretaries to perform work that a receptionist in the bargaining unit previously performed on an exclusive basis and non-bargaining unit Holy Family Learning employes to perform work that lunch monitors, school monitors and paraprofessionals – special education (at large) in the bargaining unit previously performed on an exclusive basis.[4] As set forth in its brief, the Association also alleges that the District is using non-bargaining unit teachers to perform work that the lunch monitors previously performed on an exclusive basis and non-bargaining unit Dynasty Security employes to perform work that the school monitors previously performed on an exclusive basis.[5]

The District has answered that the charge should be dismissed because it did not transfer any bargaining unit work to Holy Family Learning employes. In its brief, the District contends that the charge as to the receptionist also should be dismissed because it will cease and desist from using the confidential secretaries to perform work previously performed by the receptionist. The District further contends that the charge as to the lunch monitors, the schools monitors and the paraprofessionals – special education (at large) should be dismissed for lack of substantial evidence that it transferred any of their work to the Holy Family Learning employes, the teachers or the Dynasty Security employes.

An employer commits unfair practices under sections 1201(a)(1) and (5) if it unilaterally transfers to non-members of a bargaining unit work that members of the bargaining unit previously performed on an exclusive basis. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). The transfer of "any" such work to non-

[4] The Association withdrew an additional allegation that the District transferred bargaining unit work to non-members of the bargaining unit when it began using non-bargaining unit daily substitute employes to perform work that a central registration office secretary in the bargaining unit previously performed (N.T. 10, 307-308).

[5] Although this allegation is not set forth in the charge, it will be addressed nonetheless because a charge of this nature is to be broadly construed to cover a transfer of bargaining unit work to any non-member of the bargaining unit. See Youngwood Borough, 17 PPER ¶ 17035 (Order Directing Remand to Hearing Examiner for Further Proceedings 1986), where the Board construed a charge alleging a transfer of bargaining unit work to the State Police as also covering a transfer of bargaining unit work to a constable. The District does not contend otherwise.

members of the bargaining unit must be bargained. City of Harrisburg v. PLRB, 605 A.2d 440, 442 (Pa. Cmwlth. 1992)(emphasis in original). If members and non-members of the bargaining unit have performed the same work, a change in the extent to which they each perform the work also must be bargained. City of Jeanette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006), citing AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992).

The charging party has the burden of proving its charge 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).

As to the receptionist, the record shows that for the 2007-2008 school year the District used non-bargaining unit confidential secretaries to perform some of the work that the receptionist as a member of the bargaining unit previously performed on an exclusive basis. See findings of fact 1-3. The record also shows that the District did so unilaterally. See finding of fact 10. On that record, it is apparent that the District unilaterally transferred bargaining unit work to non-members of the bargaining unit and thus committed unfair practices under sections 1201(a)(1) and (5).[6] See Mars Area School District, supra (employer violated sections 1201(a)(1) and (5) by unilaterally using non-bargaining unit volunteers to perform work previously performed by teacher aides in a bargaining unit).

The District contends that the charge as to the receptionist should be dismissed because it will cease and desist from using the confidential secretaries to perform work previously performed by the receptionist. Notably, however, the District's willingness to cease and desist from using the confidential secretaries to perform work previously performed by the receptionist post-dates the charge and as such in unavailing. See North Hills School District, 29 PPER ¶ 29063 (Final Order 1998)(an employer's belated recognition of its obligation to bargain under the PERA provides no basis for dismissing a charge). Moreover, it is unaccompanied by a mea culpa or make whole offer disseminated to its employes, both of which are required in order to dismiss a charge where an employer repudiates its own conduct. See Philadelphia Housing Development Corporation, 34 PPER 145 (Final Order 2003)(an employer's repudiation of its own conduct unaccompanied by a mea culpa and make whole offer disseminated to its employes provided no basis for the dismissal of a charge). The District's contention is, therefore, without merit.

As to the lunch monitors, the record shows that for the 2007-2008 school year the District used non-bargaining unit teachers alone to perform work maintaining order in the lunch rooms that the lunch monitors as members of the bargaining unit previously performed along with them.[7] See findings of fact 1, 4-5. The record also shows that the District did so unilaterally. See finding of fact 10. On that record, it is apparent that the District unilaterally transferred bargaining unit work to non-members of the bargaining unit and thus committed unfair practices under sections 1201(a)(1) and (5). See Wyoming Valley West School District, 32 PPER ¶ 32008 (Final Order 2008)(employer violated sections 1201(a)(1) and (5) by unilaterally using non-bargaining unit volunteers alone to perform stadium clean-up work that they and custodians in a bargaining unit both previously performed).

The District contends that the charge as to the lunch monitors should be dismissed for lack of substantial evidence that it transferred any of their work to the teachers. In support of its contention, the District points out that the teachers previously maintained order in the lunch rooms. See finding of fact 4. According to the District, it lawfully exercised its managerial right to determine the level of services it provides

[6] Although not dispositive, it is noted that the District did not transfer to non-members of the bargaining unit all of the work that the receptionist previously performed. The receptionist's work included operating a switchboard to answer phone calls and greeting visitors to the administration building. See finding of fact 2. The District now uses automated systems to answer the phones and to permit entry to the building. See finding of fact 3. Thus, there is no basis for finding that the District transferred to non-members of the bargaining unit the receptionist's work of operating the switchboard and of greeting visitors. The Association does not contend otherwise.

[7] The record does not show that the District transferred any of the work of the lunch monitors to Holy Family Learning employes as alleged in the charge.

when it decided to use the teachers alone to maintain order in the lunch rooms. The District reasons as follows:

> "In 2006-2007, the District cho[]se to provide two layers of service – i.e. services from teachers and from lunch monitors. In 2007-2008, the District cho[]se to provide one layer of service – services by teachers. It may be that in 2006-2007 students in the cafeteria received quicker assistance in getting their milk carton opened that they did in 2007-2008. However, this does not amount to an unfair labor practice. By analogy, a school district may choose to maintain very clean buildings and to accomplish that may employ a large custodian staff; that same district may later decide it can tolerate buildings that are not as clean and as a result may determine to employ few[er] custodians. That is within management's discretion and does not constitute an unfair labor practice."

Brief at 16-17.

The District overlooks, however, that in using teachers alone to maintain order in the lunch rooms it reduced the extent to which it had been using the lunch monitors to perform that work along with them. As noted above, a reduction in the extent to which members of a bargaining unit perform the same work as non-members of the bargaining unit must be bargained. City of Jeanette, supra, citing AFSCME, Council 13, supra. Moreover, the District's analogy to an employer's right to employ fewer custodians is imperfect in that it assumes that no one other than a member of a bargaining unit performed the work at issue, which is not the case here. The District's contention is, therefore, without merit.

As to the school monitors, the record shows that for the 2007-2008 school year the District used non-bargaining unit Holy Family Learning employes, Dynasty Security employes and teachers alone to perform work maintaining order in the hallways that the school monitors as members of the bargaining unit previously performed along with them. See findings of fact 1, 6-7. The record also shows that the District did so unilaterally. See finding of fact 10. On that record, it is apparent that the District unilaterally transferred bargaining unit work to non-members of the bargaining unit and thus committed unfair practices under sections 1201(a)(1) and (5).[8] See Wyoming Valley West School District, supra (employer violated sections 1201(a)(1) and (5) by unilaterally using non-bargaining unit volunteers alone to perform stadium clean-up work that they and custodians in a bargaining unit both previously performed).

In addition, the record shows that for the 2007-2008 school year the District used Holy Family Learning employes to perform work taking attendance in the late room and making sure that students did not leave the late room that the school monitors previously performed on an exclusive basis. See findings of fact 6-7. The record also shows that the District did so unilaterally. See finding of fact 10. On that record, it is apparent that the District unilaterally transferred bargaining unit work to non-members of the bargaining unit and thus committed unfair practices under sections 1201(a)(1) and (5). See Mars Area School District, supra (employer violated sections 1201(a)(1) and (5) by unilaterally using non-bargaining unit volunteers to perform work previously performed by teacher aides in a bargaining unit).

The District contends that the charge as to the school monitors should be dismissed for lack of substantial evidence that it transferred any of their work to the Holy Family Learning employes, the Dynasty Security employes or the teachers. In support of its contention, the District points out that the Holy Family Learning employes, the Dynasty Security employes and/or the teachers previously maintained order in the hallways, the bathrooms and the locker rooms. See finding of fact 6. In keeping with its argument relative to the lunch monitors, the District submits that it lawfully exercised its

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[8] Although not dispositive, the record does not show, as the Association contends, that the District transferred to non-members of the bargaining unit all of the work that the school monitors previously performed. The school monitor's work included taking attendance and maintaining order in study halls, keeping a log of students using hall passes and writing up detentions for students who were late to lunch. See finding of fact 6. The District no longer has study halls, keeps a log of students using hall passes or writes up detentions for students who are late to lunch. See finding of fact 7. Thus, contrary to the Association's contention, there is no basis for finding that the District transferred to non-members of the bargaining unit the school monitors' work of taking attendance and maintaining order in study halls, keeping a log of students using hall passes and writing up detentions for students who were late to lunch.

managerial right to determine the level of services it provides when it decided to use the Holy Family Learning employes, the Dynasty Security employes and/or the teachers alone to perform that work. The District overlooks, however, that in using the Holy Family Learning employes, the Dynasty Security employes and/or the teachers alone to perform that work it reduced the extent to which it had been using the school monitors to perform that work along with them. The District also overlooks that it used Holy Family Learning employes to perform work taking attendance in the late room and making sure that students did not leave the late room that the school monitors previously performed on an exclusive basis. See findings of fact 6-7. The District's contention is, therefore, without merit.

As to the paraprofessionals – special education (at large), the record shows that for the 2007-2008 school year the District used non-bargaining unit Holy Family Learning employes to perform classroom behavior modification work for special education students that the paraprofessionals – special education (at large) previously performed on an exclusive basis as members of the bargaining unit. See findings of fact 1, 8-9. The record also shows that the District did so unilaterally. See finding of fact 10. On that record, it is apparent that the District unilaterally transferred bargaining unit work to non-members of the bargaining unit and thus committed unfair practices under sections 1201(a)(1) and (5). See Mars Area School District, supra (employer violated sections 1201(a)(1) and (5) by unilaterally using non-bargaining unit volunteers to perform work previously performed by teacher aides in a bargaining unit).

The District contends that the charge as to the paraprofessionals – special education (at large) should be dismissed for lack of substantial evidence that it transferred any of their work to the Holy Family Learning employes. As the District points out, the paraprofessionals – special education (at large) previously worked with teachers who have special education students in their classrooms, focusing on the academics of the special education students, while the Holy Family Learning employes work with individual special education students, focusing on their behavior in the classroom. See findings of fact 8-9. The District overlooks, however, that whatever their focus the paraprofessionals – special education (at large) modified the classroom behavior of special education students before the District began using the Holy Family Learning employes to perform that work. Thus, the work of modifying the behavior of special education students in the classrooms is bargaining unit work. As noted above, the transfer of "any" bargaining unit work to non-members of the bargaining unit must be bargained. City of Harrisburg, supra. The District's contention is, therefore, without merit.

In a case of this nature, where bargaining unit employes have been furloughed and their work unilaterally transferred to non-members of the bargaining unit, the employer is to be directed not only to cease and desist from its violations of the PERA but also to rescind the transfer of the bargaining unit work to the non-members of the bargaining unit, to reinstate that work to the bargaining unit and to make whole any bargaining unit employe who lost wages and/or benefits because of its transfer of their work to the non-members of the bargaining unit. Reynolds School District, 37 PPER 117 (Final Order 2006).

## 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 PERA.

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

3. The Board has jurisdiction over the parties.

4. The District has committed unfair practices under sections 1201(a)(1) and (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 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 PERA.

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 non-members of the bargaining unit;

b. Reinstate to the bargaining unit the bargaining unit work it transferred to non-members of the bargaining unit;

c. Submit in writing to the 14 lunch monitors, the 14 school monitors and the five paraprofessionals – special education (at large) reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them and make them whole for any loss of pay or benefits suffered by them 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 to them and that they did not exercise due diligence to find interim employment. Earnings in one particular quarter shall have no effect on the liability for any other quarter;

e. Pay interest at the simple rate of six per cent per annum on any backpay due employes from the date they would have been earned the pay up to the date it pays them;

f. 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

g. 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 fourth day of August 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner