

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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

**FINAL ORDER**

Woodland Hills School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on August 24, 2009.<sup>1</sup> The District's exceptions challenge an August 4, 2009 Proposed Decision and Order (PDO), in which the Hearing Examiner determined that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by assigning the bargaining unit work of lunch monitors, school monitors and special education paraprofessionals<sup>2</sup> to non-bargaining unit personnel (teachers and employes of Holy Family Learning and Dynasty Security), without first having bargained with the Woodland Hills Educational Support Personnel Association, PSEA/NEA (Association). The facts relevant to the District's exceptions, as found by the Hearing Examiner, are summarized as follows.<sup>3</sup>

Prior to July 1, 2007, the District employed 14 lunch monitors, 14 school monitors, and 21 special education paraprofessionals, who were members of the bargaining unit represented by the Association. The District had also contracted with Holy Family Learning for four employes for a self-contained classroom for 15 special education students, known as the essentials classroom. The Holy Family Learning employes assigned to the essentials classroom would follow the special education students in the hallways and to the lunch room. In addition, the District also 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.<sup>4</sup> Teachers also kept students moving in the hallways between classes, performed hall sweeps during class time, kept students from misbehaving in the bathrooms and the locker rooms, and made sure that students stayed in the lunch room.

The duties of the school monitors in the high school were to maintain order in the hallways, study halls and late room. The school monitors made sure that students kept moving between classes and had passes to be in the hallways during classes. They also made sure that students did not leave the lunch room during lunch. They recorded the names of students using passes, escorted students to the principal's office for disciplinary action and issued detention to students who were late for lunch. They checked the bathrooms and the locker rooms for misbehaving students. They also took attendance in study halls and in the late room for tardy students, and made sure that students behaved in the study halls and did not leave the late room.

In the lunch room at the two junior high schools, three intermediate schools and three primary schools, the District used lunch monitors to maintain order during breakfast and lunch. Lunch monitors worked alongside teachers in the lunch room to line up students to get meals, direct them back to their seats, take them out for recess, help them take off their coats, cut up their food, open their drinks, and pass out spoons and ketchup.

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<sup>1</sup> The District also requests oral argument before the Board. However, the request is denied because there are no novel issues presented by the exceptions and the District's arguments are thoroughly set forth in its exceptions and brief.

<sup>2</sup> The actual job title of the paraprofessional position at issue is paraprofessional - special education (at large).

<sup>3</sup> The District does not except to the Hearing Examiner's findings and conclusions relating to the unlawful removal of bargaining unit work performed by Lee Hricko as a receptionist in the main office at the District's administration building.

<sup>4</sup> The District expects any adult to help maintain order in the hallways between classes.

The special education paraprofessionals worked with teachers who had special education students in their classrooms. The paraprofessionals escorted 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 individualized education program (IEP) meetings for the students, informed the teachers whether 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.

For the 2007-2008 school year, the District eliminated the essentials classroom and contracted with Holy Family Learning for additional employees to focus on the behavior of 35-40 special education students at the high school. The District furloughed five special education paraprofessionals, and used the seven Holy Family Learning employees to modify, as needed, the classroom behavior of the special education students. The Holy Family Learning employees followed the special education students in the hallways and into the bathrooms and locker rooms to modify their behavior as needed.<sup>5</sup>

The District also furloughed the 14 school monitors at the start of the 2007-2008 school year. During that year, the District eliminated the school monitors' duties in the study halls by creating academic support and achievement classes (known as ASE's) that are taught by teachers. In addition, because it eliminated the school monitor positions, the District no longer kept a log of students using passes or issued detention for students who were late for lunch. However, teachers continued making sure that students stayed in the lunch room and continued performing hall sweeps. Dynasty Security employees continued making sure that students kept moving between classes and had passes to be in the hallways during classes. The Holy Family Learning employees also checked students for passes allowing them to be in the hallways.

The District also furloughed the 14 lunchroom monitors as of the 2007-2008 school year. During that school year, the District used teachers alone to assist students and maintain order in the lunch rooms. The District did not bargain with the Association before it furloughed the lunch monitors, school monitors, and special education paraprofessionals, and transferred their work to non-members of the bargaining unit.

Based on the testimony and evidence presented, the Hearing Examiner found that the District had not ceased monitoring the hallways or lunchrooms, or the behavior of special education students, but continued to provide those services without the use of bargaining unit employees. Because the District had varied the extent to which bargaining unit members performed these services, indeed eliminated it completely, the Hearing Examiner concluded that under the relevant caselaw, including AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992), the District unlawfully removed bargaining unit work in violation of Section 1201(a)(1) and (5) of PERA.

The District argues that in finding an unfair practice, the Hearing Examiner misapplied the law regarding removal of work that is not exclusively performed by the bargaining unit. The District claims that the finding of an unfair practice for removal of the work historically shared by school monitors and lunchroom monitors and non-bargaining unit employees is inconsistent with its managerial right to eliminate bargaining unit positions.

However, the Hearing Examiner's assessment of the state of the law is correct. While an employer need not bargain with the employee representative over its decision to completely and permanently cease providing a particular discretionary service, Washington Lodge No. 7, Fraternal Order of Police v. City of Easton, 36 PPER 141 (Final Order, 2005) (citing, Youngwood Borough Police Department v. PLRB, 539 A.2d 26 (Pa. Cmwlth. 1988), petition for allowance of appeal denied, 522 Pa. 599, 562 A.2d 323 (1989), or to eliminate positions and reassign the work to other employees in the bargaining unit, Wissahickon Educational Support Personnel Association v. Wissahickon School District, 35 PPER 9 (Proposed Decision and Order, 2004) (citing, PLRB v. Cornell School District, 13

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<sup>5</sup> The District eventually rehired four special education paraprofessionals. Further, the District alleges in its exceptions that it ceased utilizing Holy Family Learning employees after the 2007-2008 school year.

PPER ¶13267 (Final Order, 1982), affirmed 14 PPER ¶14147 (Court of Common Pleas of Allegheny County, 1983), an employer may not eliminate bargaining unit positions and continue to provide a service that was previously performed in whole or in part by bargaining unit members solely with non-bargaining unit employees. E.g. Bradford County Vocational-Technical School Educational Support Personnel Association v. Northern Tier Career Center, 28 PPER 28066 (Final Order, 1997). As the Board and the Commonwealth Court have recognized:

An unfair labor practice occurs when an employer unilaterally removes work that is exclusively performed by the bargaining unit without prior bargaining with the union ... An employer also commits an unfair labor practice when it alters a past practice related to assignment of bargaining unit work to non-unit members or varies the extent to which members and non-members of the unit have performed the same work.

City of Jeannette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006) (citing, AFSCME, Council 13, supra.). Since AFSCME, Council 13, the Board has consistently found a violation of Section 1201(a)(1) and (5) of PERA "if the employer significantly alters its past practice regarding the assignment of bargaining unit work to non-unit members or if the employer varies the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educational Support Personnel Association v. Wyoming Valley West School District, 32 PPER ¶32008 at 28-29 (Final Order, 2000). Thus, even where the service is jointly performed by both bargaining unit and non-bargaining unit employees, the employer cannot unilaterally decide to continue to perform the service exclusively with non-bargaining unit employees, without first fulfilling its collective bargaining obligation. AFSCME, Council 13, supra; Wyoming Valley West School District, supra. As was aptly stated in Fraternal Order of Police Lodge No. 9 v. City of Reading, 32 PPER ¶32158 (Proposed Decision and Order, 2001), where work that was previously shared by bargaining unit and non-bargaining unit employees was unilaterally assigned by the employer exclusively to non-bargaining unit employees:

[t]his new assignment of the work alters the extent to which bargaining unit members and non-bargaining unit members performed the same work. The bargaining unit share of the work went from an equal share to nothing. This unilateral alteration in the extent of the assignment of work performed by non-bargaining unit employees is significant and constitutes ... [an] unfair labor practice.

City of Reading, 32 PPER at 388.

As discussed by the Hearing Examiner in the PDO, the law with respect to the removal of work from the lunchroom monitors is straightforward. Prior to July 1, 2007, one bargaining unit employe was assigned to the lunchroom for breakfast, and two lunchroom monitors were assigned to the lunchroom during each of the four lunch periods. The lunchroom monitors assisted teachers in lining up students to get meals, directing them back to their seats, taking them out for recess, helping them take off their coats, cutting up their food, opening their drinks, and passing out spoons and ketchup. After July 1, 2007, those duties were performed exclusively by non-bargaining unit teachers.

Although the District alleges that no additional teachers were assigned to the lunchrooms after July 1, 2007, for purposes of a charge alleging an unlawful removal of bargaining unit work, the relevant question is whether bargaining unit employees have lost their respective share of the work. City of Reading, supra.; Wyoming Valley West School District, supra.; AFSCME, Council 13, supra. Because the previously shared duties in the lunchroom are no longer assigned to bargaining unit employees, but are now performed exclusively by non-bargaining unit teachers, the District has unilaterally altered the extent to which this work is performed by bargaining unit and non-bargaining unit employees, and has thereby committed an unfair practice.

With regard to the school monitor positions, bargaining unit school monitors had maintained order in the hallways of the high school by making sure that students kept moving between classes and had passes to be in the hallways during classes. The school

monitors recorded the names of students using passes, and when necessary, escorted students to principals for disciplinary action. They also checked the bathrooms and the locker rooms for misbehaving students. The school monitors made sure that students did not leave the lunch room during lunch, and issued detention to students who were late for lunch. They also took attendance in study halls and in the late room (for tardy students) and made sure that students behaved in the study halls and did not leave the late room.

As of the 2007-2008 school year, the District eliminated the study halls.<sup>6</sup> In addition, the District ceased recording the names of students using passes, and stopped issuing detention to students who were late for lunch. While the District lawfully eliminated certain duties that were exclusively performed by the school monitors, the District did not eliminate other duties that had been performed by both the school monitors and non-unit personnel, such as keeping the students moving in the hallways between classes, checking for passes to be in the hallways during classes, checking the bathrooms and the locker rooms for misbehaving students, and escorting students to the principal's office for disciplinary action.

The removal of any bargaining unit work without prior negotiation is an unfair practice. E.g. City of Jeannette, supra. While prior to July 1, 2007, the duties of monitoring the hallways, checking for hall passes, checking the restrooms and locker rooms, and escorting students, were shared by bargaining unit school monitors, non-bargaining unit teachers and Dynasty Security employees, during the 2007-2008 school year those duties were performed without school monitors and exclusively by non-bargaining unit employees. Thus, by unilaterally eliminating the bargaining unit school monitors' participation in these shared duties, the District unlawfully removed bargaining unit work in violation of PERA.

The District raises a somewhat different issue regarding the special education paraprofessionals. The District argues that the work performed by the Holy Family Learning employees was significantly different than that performed by the special education paraprofessionals, and therefore, there was no unlawful removal of bargaining unit work.

It has been recognized that where an employer creates a new public service that had never been performed by bargaining unit employees, there is no removal of bargaining unit work when the employer retains outside contractors to perform the new service. Keystone Central Educational Support Personnel Association v. Keystone Central School District, 28 PPER ¶28184 (Proposed Decision and Order, 1997). However, where the employer merely modifies a service that has been performed by bargaining unit employees, the public employer is not excused from its statutory obligation to negotiate with the union before assigning that work outside of the bargaining unit, even if bargaining unit employees would need additional training to continue to perform the service. Pennsylvania State Police v. PLRB 912 A.2d 909 (Pa. Cmwlth. 2006) (finding of an unlawful removal of bargaining unit work of supervising call center was sustained even though employees would have needed training in new manner of operating call center).

The position of special education paraprofessional requires an associates degree, and is focused on the student's academics. The special education paraprofessionals were assigned to a particular classroom and modified the classroom behavior of misbehaving special education students. The paraprofessionals also escorted special education students to and from their busses, informed the teachers of any behavioral problems the students might be having, collected data for behavior plans for the students, and scheduled IEP meetings for them.

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<sup>6</sup> The District seeks a remand to introduce evidence that in 2007, it also ceased operation of the late room. However there is uncontroverted testimony presented by the Association that during the 2007-2008 school year, the late room was staffed by Holy Family Learning employees. Moreover, even if the District offered evidence that the late room was no longer operational after July 1, 2007, it would not change the outcome in this case because the District removed other duties from the school monitors while continuing to assign those duties to non-bargaining unit personnel. Accordingly, the District's request for a remand to reopen the record is denied. AFSCME, Council 88 v. Berks County (Coroner), 36 PPER 36 (Final Order, 2005) (the Board will only grant a request to reopen the record if proffered evidence is (1) new, (2) could not have been obtained at the time of the hearing, (3) is relevant and non-cumulative, (4) is not offered solely for purposes of impeachment, and (5) is likely to compel a different result).

The duties of the Holy Family Learning employees were described as follows:

work with an identified group of students to identify target behaviors that required change, to develop behavior plans, behavior modification plans designed to change those behaviors, and then to implement that behavior plan, which entailed positive reinforcement interventions that would occur across a variety of environments, as well as responding to incident events in a clinical and therapeutic way when those events occurred.

(N.T. 217). While the Holy Family Learning employees had training in behavior modification techniques, employees did not need formal education beyond high school. (N.T. 219, 238).

The District essentially argues that the Holy Family Learning employees are assigned a specific roster of individual special education students, who they follow around the school, and proactively modify their behavior as needed, which is unlike the duties of the special education paraprofessionals, who are assigned to students in a particular classroom, are focused on student academics, and are generally reactive in addressing student behavior. However, as found by the Hearing Examiner, both special education paraprofessionals and Holy Family Learning employees modify the classroom behavior of special education students. The District did not substantially change the service of modifying students' classroom behavior, but allegedly switched to an individualized and pro-active style, as opposed to being classroom based and reactive in the manner of providing that service. Even if the special education paraprofessionals would have needed additional training, this would not excuse the District from bargaining over the removal of the behavior modification duties from the bargaining unit. Pennsylvania State Police, supra. Thus, the District violated Section 1201(a)(1) and (5) of PERA by subcontracting that work without first negotiating with the Association. See, PLRB v. Employees' Committee of the Wilkinsburg Sanitation Department, 463 Pa. 521, 345 A.2d 641 (1975) (employer satisfied statutory obligation to bargain to impasse before subcontracting bargaining unit work of trash collection); Snyder County and Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006) (employer was required to fulfill its statutory obligations under PERA to negotiate subcontracting of prison cafeteria work).

The District also challenges the Hearing Examiner's order directing reinstatement and make-whole relief. The relief directed by the Board is discretionary and is designed to remedy the unfair practice by restoring the *status quo ante*. 43 P.S. §1101.1303; In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); Pennsylvania State Police, supra. The District argues that reinstatement and make-whole relief for the special education paraprofessionals and school monitors is inappropriate because during the 2007-2008 school year, the District reinstated four of the five special education paraprofessionals, and two school monitors were assigned to the late room which allegedly no longer exists. However, for some period of time the special education paraprofessionals and school monitors were out of work and/or lost wages as a result of the District's failure to satisfy its bargaining obligation prior to the removal of the employees' bargaining unit work.<sup>7</sup>

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the District violated Section 1201(a)(1) and (5) of PERA by unlawfully removing bargaining unit work from the special education paraprofessionals, school monitors and lunchroom monitors, without bargaining with the Association. Further, to remedy the District's unfair practice, it is not an abuse of discretion to direct reinstatement and make-whole relief for displaced bargaining unit employees. Accordingly, the District's exceptions shall be dismissed and the Proposed Decision and Order made final.

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<sup>7</sup> Issues concerning the actual reinstatement or back pay obligations owed under the Board's order may be presented to the Board in compliance proceedings. See PLRB v. North Hills School District, 8 PPER 208 (Court of Common Pleas of Allegheny County, 1977) (disputes regarding whether party failed to comply with relief directed by Board are litigated at the compliance stage of the proceedings, if necessary); PLRB v. Northeastern Educational Intermediate Unit, 18 PPER ¶18203 (Final Order, 1987) (same).

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Woodland Hills School District are hereby dismissed, and the August 4, 2009 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania 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 December, 2009. 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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Pennsylvania Labor Relations Board

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**AFFIDAVIT OF COMPLIANCE**

The Woodland Hills School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe relations Act, that it has rescinded the transfer of bargaining unit work to non-members of the bargaining unit, that it has reinstated to the bargaining unit the bargaining unit work it transferred to non-members of the bargaining unit, that it has submitted in writing to the 14 lunch monitors, the 4 school monitors and the five paraprofessionals - special education (at large) offers of reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them, that it has made 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, that it has calculated and paid with interest any backpay due as set forth in the proposed decision and order, that it has posted the proposed decision and order and final order as directed, and that it has served an executed copy of this affidavit on the Association.

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

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public