

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CHAMBERSBURG AREA EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION/PSEA/NEA :
:
v. : Case No. PERA-C-09-406-E
:
CHAMBERSBURG AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On October 8, 2009, the Chambersburg Area Education Support Association/PSEA/NEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Chambersburg Area School District (District) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by "unilaterally remov[ing] bargaining unit work without bargaining when [it] made the decision to transfer the duties of the copy room clerk and classroom assistants to Xerox[.]" On October 29, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 25, 2010, if conciliation did not resolve the charge by then. On November 12, 2009, the District filed an answer averring that it "did not commit an unfair practice because the positions of 'copy room clerk' and 'classroom assistant' were eliminated and the employes furloughed for budgetary reasons" and "because it does not supervise, direct or control the work of Xerox employes." The District also raised new matter that its "elimination of the copy room clerk and classroom assistant, and subsequent furlough of the employes, is not subject to negotiation" and that the charge is or may be untimely, barred by the doctrine of waiver and barred by the doctrine of election of remedies. The hearing examiner held the hearing as scheduled and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On April 7, 2010, the District filed a brief by deposit in the U.S. Mail. On May 14, 2010, the Association filed a brief and proposed findings of fact and conclusions of law.

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 December 18, 1996, the Board certified the Association as the exclusive representative of a bargaining unit comprised of white-collar, nonprofessional employes of the District. (Case No. PERA-R-96-293-E)
2. For years prior to the summer of 2009, the District used members of the bargaining unit (Diedre Jones, working as a classroom assistant at the middle school; Linda McCalom, working as the copy room clerk at the high school; and Donna Saunders, working as a classroom assistant at the junior high school) and non-members of the bargaining unit (two Xerox employes) to perform copying work. (N.T. 13, 16-17, 27-29, 34-38, 40, 45-46, 48-52, 71)
3. On August 12, 2009, the District abolished the positions held by Ms. Jones, Ms. McCalom and Ms. Saunders and furloughed them. (Association Exhibit 4)
4. The District thereafter began using the Xerox employes to perform all of the copying work. (N.T. 19, 44, 58, 67)
5. The District did not bargain with the Association before using the Xerox employes to perform all of the copying work. (N.T. 18, 70)

DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1) and (5) by "unilaterally remov[ing] bargaining unit work without

bargaining when [it] made the decision to transfer the duties of the copy room clerk and classroom assistants to Xerox[.]”

The District has answered that the charge should be dismissed (1) “because the positions of ‘copy room clerk’ and ‘classroom assistant’ were eliminated and the employees furloughed for budgetary reasons,” (2) “because it does not supervise, direct or control the work of Xerox employees,” (3) because the “elimination of the copy room clerk and classroom assistant, and subsequent furlough of the employees, is not subject to negotiation,” (4) because the charge is or may be untimely, (5) because the charge is or may be barred by the doctrine of waiver and (6) because the charge is or may be barred by the doctrine of election of remedies. In its brief, the District also contends that the charge should be dismissed because it did not transfer to the Xerox employees the “essential function” of the classroom assistants.

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-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 record shows that for years prior to the summer of 2009 the District used members of the bargaining unit (Ms. Jones, Ms. McCalom and Ms. Saunders) and non-members of the bargaining unit (two Xerox employees) to perform copying work (findings of fact 1-2), that on August 12, 2009, the District abolished the positions held by Ms. Jones, Ms. McCalom and Ms. Saunders and furloughed them (finding of fact 3) and that the District thereafter began using the Xerox employees to perform all of the copying work (finding of fact 4). The record also shows that the District did not bargain with the Association before using the Xerox employees to perform all of the copying work (finding of fact 5).

On that record, it is apparent that the District unilaterally changed the extent to which members of the bargaining unit (Ms. Jones, Ms. McCalom and Ms. Saunders) and non-members of the bargaining unit (the Xerox employees) had been performing the same work (copying). Thus, under City of Jeanette, supra, the District must be found to have violated sections 1201(a)(1) and (5). See also 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 members of a bargaining unit both previously performed).

None of the contentions raised by the District in its answer and new matter has merit.

The District first contends that the charge should be dismissed “because the positions of ‘copy room clerk’ and ‘classroom assistant’ were eliminated and the employees furloughed for budgetary reasons.” The dispositive inquiry under City of Jeanette, supra, however, is whether or not the District unilaterally changed the extent to which members and non-members of the bargaining unit perform the same work. Thus, in deciding the merits of the charge, whether or not the District eliminated positions and furloughed employees for economic reasons is irrelevant.

The District next contends that the charge should be dismissed because it does not “supervise, direct or control the work of Xerox employees.” Again, however, the dispositive inquiry is whether or not the District unilaterally changed the extent to which members and non-members of the bargaining unit perform copying work. Whether or not the District supervises, directs and controls the Xerox employees is, therefore, irrelevant, too.

The District next contends that the charge should be dismissed because the “elimination of the copy room clerk and classroom assistant, and subsequent furlough of the employees, is not subject to negotiation.” Again, however, the dispositive inquiry is whether or not the District unilaterally changed the extent to which members and non-members of the

bargaining unit perform copying work. Whether or not the elimination of positions and subsequent furlough of employees is subject to negotiation is, therefore, irrelevant as well.

The District next contends that the charge should be dismissed as untimely filed because the Association did not file it within four months of June 30, 2002, which is when a memorandum of understanding the parties bargained regarding a subcontract of bargaining unit ten years ago expired by its own terms. See Association Exhibit 2. The Association has not charged that the District committed unfair practices by violating that memorandum of understanding in 2002, however; rather, the Association has charged that the District committed unfair practices by unilaterally transferring bargaining unit work to non-members of the bargaining unit in August 2009. Inasmuch as the Association filed the charge within four months of August 2009, the charge is timely filed.

The District next contends that the charge should be dismissed as barred by the doctrine of waiver. The District finds support for its contention in section 15.1 of the parties' current collective bargaining agreement, which provides as follows:

"15.1 Finality: The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject and matter within collective bargaining and that the understandings arrived at after the exercise of that right are as set forth in this agreement.

Therefore, the District and the Association for the life of this Agreement each voluntarily waives the right to bargain collectively with respect to any subject or matter referred to or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement. The express provisions of this agreement for its duration, therefore, constitute the complete and total contract between the District and the Association with respect to rates of pay, wages, hours of work and other conditions of employment. Nothing herein contained shall prevent negotiations concerning future contracts during the life of this contract, which negotiations shall be as provided in Act 195, the Public Employee[] Relations Act and Act 88."

See Respondent Exhibit 5. According to the District, this zipper clause insulates it from any liability for its unilateral action here. In Millcreek School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), however, the court held that a zipper clause "does not permit unilateral alteration of the status quo without bargaining." Id. at 737.

The District next contends that the charge should be dismissed as barred by the doctrine of election of remedies. The District finds support for its contention in the fact that the Association did not file a grievance even though the memorandum of understanding the parties bargained regarding the subcontract of bargaining unit work ten years ago provided for the filing of grievances if it was violated (N.T. 16, 26; Association Exhibit 2). The District cites West Middlesex Area School District v. PLRB, 423 A.2d 781 (Pa. Cmwlth. 1980), for the proposition that "the doctrine of election of remedies is applicable in a case where two possible remedies are available to a complainant and where there was a 'deliberate and knowing resort to one of two inconsistent paths to relief.'" Brief at 3. The District also relies on Township of Falls v. Whitney, 730 A.2d 557 (Pa. Cmwlth. 1999), where the court found that a police officer challenging a disciplinary action had no right to pursue a grievance after he requested a hearing under the Police Tenure Act. Given that the Association never filed a grievance, however, there is no basis for finding that it has elected to pursue a remedy other than by way of the charge, and Township of Falls is distinguishable on the facts.

The contention raised by the District in its brief also is without merit. According to the District, the charge should be dismissed because it did not transfer to the Xerox employees the "essential function" of the classroom assistants (Ms. Jones and Ms. Saunders). Brief at 7. Noting that Ms. Jones and Ms. Saunders performed a wide variety of work other than copying (N.T. 38-40, 74; Respondent Exhibits 3-4), the District cites City of Philadelphia, 31 PPER ¶ 31022 (Final Order 1999), aff'd sub nom. FOP Lodge No. 5 v. PLRB, Docket No. 148 C.D. 2000 (Pa. Cmwlth. 2001)(unreported opinion), for the

proposition that no transfer of bargaining unit work may be found to have occurred under the circumstances. The District's reliance on that case is, however, misplaced. In that case, the Board found that work being performed on a computer by non-members of a bargaining unit differed in quality and kind from the work members of the bargaining unit previously performed by hand and thus was not bargaining unit work. The record does not show that the copying work being performed by the Xerox employees differs in quality and kind from the copying work previously performed by Ms. Jones and Ms. Saunders. Thus, City of Philadelphia is inapposite. Moreover, as the court held in City of Harrisburg, supra, the transfer of any bargaining unit work to non-members of the bargaining unit must be bargained. Accordingly, regardless of whether or not the District transferred all of the work of Ms. Jones and Ms. Saunders to the Xerox employees, the same result obtains.

In a case of this nature, where members of a bargaining unit have been furloughed at the same time the employer unilaterally transferred their work 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, to rescind the transfer of the bargaining unit work to the non-members of the bargaining unit and to reinstate that work to the bargaining unit, Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 593 Pa. 730; 928 A.2d 1292 (2007), but also 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 to the Xerox employes of the copying work previously performed by Ms. Jones, Ms. McCalom and Ms. Saunders;
 - b. Reinstate to the bargaining unit the copying work previously performed by Ms. Jones, Ms. McCalom and Ms. Saunders;

c. Submit in writing to Ms. Jones, Ms. McCalom and Ms. Saunders unconditional offers of 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 their positions were abolished 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 them. 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 Ms. Jones, Ms. McCalom and Ms. Saunders;

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 employees 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 ninth day of June 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner