

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ROCHESTER AREA EDUCATION :
ASSOCIATION PSEA/NEA :
: :
v. : Case No. PERA-C-09-411-E
: :
ROCHESTER AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On October 13, 2009, the Rochester Area Education Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Rochester Area School District (District) violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA), by allegedly providing instruction for health and physical education classes through an outside party instead of recalling furloughed bargaining unit members.

On October 22, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on March 31, 2010, in Pittsburgh, Pennsylvania. During the hearing, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).
3. Prior to the 2009-2010 school year, the District employed three physical education teachers. Patricia Smith and Nathan Rhode shared the teaching load for physical education classes in the junior-senior high school. Mr. Rhode taught the male students grades 9-12, and Ms. Smith taught the female students grades 9-12. The physical education classes for students in the 7th and 8th grades were co-ed. Tom Pasquale taught elementary physical education. The District furloughed Mr. Pasquale in May 2009. (N.T. 9-10, 36, 52-53; District Exhibit 3).
4. The District furloughed several other teachers before the beginning of the 2009-2010 school year. (N.T. 104, 113).
5. At the beginning of the 2009-2010 school year, the District assigned Mr. Rhode to teach one physical education class at the high school and the remainder of his physical education classes at the elementary school. (N.T. 37, 65).
6. Mr. Rhode and Ms. Smith have performed locker room checks during class periods. During the 2009-2010 school year, Ms. Smith still performed locker room checks between classes. A non-bargaining unit security guard also walks through the locker rooms during class periods. (N.T. 10-11).
7. Physical education teachers traditionally check restrooms and locker rooms to ensure order for the next class. No teacher is specifically assigned or required to check restrooms, but the administration knows that teachers do check the restrooms when student misbehavior is suspected. Every classroom teacher has a duty to check on children who go to the restroom and do not return to class; it is not specific to physical education class. (N.T. 39, 65, 66).

8. This past school year, the District experienced several bomb threats, two of which involved the restrooms. The District has since directed its security force to check restrooms every half-hour to be more visible.

9. The Beaver Valley Intermediate Unit No. 27 purchased an online health course, named Brain Honey, and made it available to the District. The Brain Honey was not provided before the 2009-2010 school year. The Union did not agree to the implementation of the Brain Honey system. (N.T. 21, 35, 72, 110).

10. Prior to the 2009-2010 school year, Barbara Blinn taught 7th and 8th grade health and high school health in a classroom without an online course. Beginning with the 2009-2010 school year, Ms. Blinn was assigned to supervise the online health course. With the online course, Ms. Blinn does not teach students health in a classroom. She monitors students' online progress, sends e-mail announcements, gives deadlines and encourages students to keep pace, all from the computer system not by physically going to or being present in a classroom. The Brain Honey program generates students' grades based on their performances. As of the 2009-2010 school year, no bargaining unit members provide direct instruction to students in health. (N.T. 20-23, 25, 32, 36, 78).

11. Ryan Bauer supervises a classroom of students who take online health at the District. There is no direct instruction from teacher to student. The classroom where students take online health is known as the health lab. Mr. Bauer ensures that students in the lab are performing the assigned materials for the day and moving at a steady pace. Mr. Bauer does not teach any health materials nor does he generate grades for the students. (N.T. 21-22, 28, 31-32, 59).

12. The District is experiencing declining enrollment due to a poor local economy with no industrial base, a transient rental population and cyber school competition. Since the 2002-2003 school year, the District's enrollment has declined by approximately 250 students. The District must pay for students who live in the District and choose to attend the cyber school. In the 2008-2009 school year the District paid \$385,000 to the cyber school. The District initiated computer-based courses to better compete with the cyber schools, keep students in the District and limit declining enrollment. (N.T. 47, 51, 88, 90).

13. The Regional Choice Initiative (RCI) program is part of a federal grant given to the District designed to maintain student enrollments without losing students to cyber and charter schools. The RCI program has been in use since 2005. The 2009-2010 school year is the first year that the District utilized strictly computerized approach for health education. There are other similar labs in the District that provide computer instruction. (N.T. 47-49, 60).

14. Due to declining enrollment, the District consolidated physical education classes. The consolidation resulted in class overcrowding. In years past, when a course was overcrowded, the District redistributed students to other classes. The RCI program and the online health course is another avenue for redistribution. (N.T. 54, 83-84).

15. During the 2009-2010 school year, 22 students in the health lab received a waiver for a quarter credit of physical education, which constitutes one semester of physical education. The District waived students out of physical education class to reduce class sizes. In past years, the District has regularly waived students out of physical education class for a semester to attend classes at the Beaver County Career and Technology Center (Vo-tech). (N.T. 42, 63-64, 76-77, 97-98, 108-109).

DISCUSSION

In its post-hearing brief the Union argues that the District unlawfully diverted work from the bargaining unit in three ways. First, the Union contends that the District assigned a non-bargaining unit security guard to perform locker room checks formerly conducted by physical education teachers. (Union's post-hearing brief at 10). Second, the Union claims that the District issued physical education waivers to students participating in extracurricular activities, the coaches of which are not all bargaining unit members. (Union's post-hearing brief at 11). The Union additionally contends that

the District unilaterally implemented an online health course which has replaced direct teacher instruction for health and into which some physical education students have been transferred with a waiver. (Union's post hearing brief at 11-12).

The Board, in Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman Sch. Dist., 37 PPER 56 (Final Order, 2006), articulated the following legal analysis for determining whether an employer unlawfully removed bargaining unit work:

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis original). In establishing an unfair practice for the removal of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra).

Lake Lehman, 37 PPER at 179.

1. LOCKER ROOM CHECKS

The Union has not met its burden of establishing that the bargaining unit exclusively performed locker room checks or a quantifiable portion thereof. Although Ms. Smith testified that she and Mr. Rhode were the only two to perform locker room checks, that testimony was undermined by Superintendent Wilkovich's testimony that the District has security guards patrolling the premises and performing locker room checks. Indeed, the guards have increased the frequency of those checks since the District received bomb threats. In this regard, the District proved that the guards are specifically assigned the responsibility of checking locker rooms and restrooms during class periods with a certain regularity. The record, however, does not show the extent to which the physical education teachers performed checks during class. The Union did not present any evidence indicating the regularity or frequency of Mr. Rhode's or Ms. Smith's locker room checks, which may have been only occasional or sporadic. Therefore, the Union did not establish an identifiable quantum of locker room checks exclusively performed by the physical education teachers.

Moreover, the Union failed to establish that the locker room check work was taken away from the unit. There is no evidence indicating that the District has forbidden Ms. Smith from calling for another teacher to temporarily watch her class while she performed locker room checks or from specifically requesting a male teacher to check the boys' locker room during physical education class. Placing such a call from her gym office would be no more disruptive than the manner in which locker room checks were previously performed.

2. ATHLETIC WAIVERS

The Union contends that the District diverted bargaining unit work by removing students from physical education to reduce class size via waiver because of those students' involvement in extracurricular programs. The Union argues that, unlike placing students in other classes to control overcrowding, athletic waivers take work away from the physical education teachers in the unit and give it to non-unit coaches.

The Union's argument fails for three reasons. First, the students were already participating in the extracurricular program, which constituted an existing qualification for the waiver. Students were not removed from physical education and placed on a sports team. The Union's argument would preclude students from receiving academic credit at the District for studying abroad or transferring credits from another school they attended. The Union's position would prevent the District from giving academic credit to students who transfer back into the District from the cyber school for the courses they have taken at the cyber school.

Second, although the Union's assertion that some coaches are not bargaining unit members is supported by the record, the Union failed to establish that the specific, individual students who received waivers for extracurricular activities were coached or taught by non-unit personnel. This record does not answer the question of whether any of the students receiving waivers for extracurricular activities are coached by a non-bargaining unit member.

Also, the Union's argument fails to account for the fact that the District has granted waivers for vo-tech students who are taught by non-bargaining unit teachers at the vo-tech school. The District has a past practice of granting waivers to students because of the involvement with and credit received for courses and activities taught by non-unit members. The extracurricular waivers, therefore, do not constitute a change. Non-unit coaches have the same status as non-unit vo-tech teachers.

3. ONLINE HEALTH COURSE

The District has suffered declining enrollments in recent years. One reason for the declining enrollment is that students in the District have opted for cyber schools. When students choose cyber schools over the District, the District must pay their tuition at the cyber school. Those tuitions are a direct cost to the District. The loss of students also affects the complement of teachers that the District needs or can afford. In the interest of stemming the loss of students to cyber schools, the District adopted a policy of competing with cyber schools to retain these students. The RCI program is part of a federal grant given to the District designed to maintain student enrollments without losing students to cyber and charter schools. Beginning with the 2009-2010 school year, the District began providing health instruction to students completely in an online format, without any substantive health materials being presented to students by way of teacher instruction. No District teachers currently teach a traditional health class.

The Union contends that the utilization of the online health program constitutes the outsourcing and diversion of bargaining unit work in the following two ways: first, it removes the unit work of professional teaching of health to students; and second it provides a basis for waiver of physical education students which diverts the teaching of physical education away from the unit and gives it to the vendors of Brain Honey.

Section 702 of PERA provides, in relevant part, as follows:

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

43 P.S. § 1101.702. This section authorizes the District to utilize the Brain Honey system as a lawful introduction of technology to advance the overall quality and level of educational services without bargaining with the Union. However, the District may not use technology as a license or pretext for removing bargaining unit work. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 144 (Final Order, 2005); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 31 PPER ¶ 31022 (Final Order, 1999). As the Board stated in City of Philadelphia, "[w]here non-unit personnel perform work through use of new technology that is substantially equivalent to work previously performed by the bargaining unit on an exclusive bases, the Board will find a duty to bargain over assignment of such work out of the unit." City of Philadelphia, 31 PPER at 55 (emphasis added).

In City of Philadelphia, the Board held that the City did not unlawfully remove the work of pin mapping criminal activity from the police unit when it hired civilian employees to develop software and a networking system which tracked and mapped criminal activity in the City and made that information accessible to police computers all over the City. The Board concluded, and the Commonwealth Court agreed, that the civilians' duties were not substantially equivalent to the previous pin mapping duties of the officers in the unit. Id. Conversely, in Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 912 A.2d 909 (Pa. Cmlwth. 2006), the Commonwealth Court affirmed the Board's determination that the Commonwealth unlawfully removed bargaining unit work when it assigned civilians to supervise dispatchers, formerly supervised by sworn members of the Pennsylvania State Police, at newly built consolidated dispatch centers. The Court therein opined that, where the introduction of technology changes the manner by which the details of the work are performed, the Board properly evaluates whether the basic or essential function of the job remains the same in determining whether an employer has unlawfully removed bargaining unit work.

In this case, I must determine whether the Brain Honey technology changes the essential function of the job of teaching health because the duties of working with Brain Honey are not substantially equivalent to those of the conventional health teacher, as in City of Philadelphia, supra, or whether that technology merely changes the details necessary to perform the job of teaching and makes performing that job function more efficient, as in State Police, supra. In other words, technology that utilizes equipment to eliminate most or all of the duties of a position does not constitute the removal of work. City of Philadelphia, supra. However, work that essentially remains the same, after technology improves the efficiency of the work, must remain in the unit. State Police, supra.

Prior to the 2009-2010 school year, the District assigned Ms. Blinn to teach health in a conventional manner. Beginning with the 2009-2010 school year, Ms. Blinn was assigned to oversee the online health course. With the online course, Ms. Blinn does not teach health in a classroom. Instead, she monitors students' online progress, sends e-mail announcements, gives deadlines and encourages students to keep pace. She performs her monitoring duties from the computer system not by physically interacting with students or by physically being present in a classroom. Brain Honey generates the students' grades based on their performances. Ms. Blinn no longer evaluates students' performance in health or generates their grades. As of the 2009-2010 school year, no bargaining unit members provide direct instruction to students in health.

Ryan Bauer supervises a classroom of students who take online health at the District. There is no direct instruction from teacher to student. The classroom where students take online health is known as the health lab. Mr. Bauer ensures that students in the lab are performing the assigned materials for the day and moving at a steady pace. Mr. Bauer does not teach any health materials and he does not generate grades for the students. I conclude that the Brain Honey system for providing health course instruction to students completely changes the manner by which substantive health course instruction is provided to District students thereby changing the essential function of the job of teaching. Ms. Blinn is no longer required to provide substantive instruction for health materials in a conventional manner. There is no evidence indicating whether Ms. Blinn or Mr. Bauer answers health questions or provides tutorial aid to students, as would a teacher or teaching assistant, or that either teacher utilizes the computer system to help students. Although Ms. Blinn monitors student progress and provides encouragement for students to keep pace with the program, she is not instructing students in the substantive information that constitutes the health course.

Because the lawful introduction and implementation of computer technology at the District has eclipsed the essential function of teaching health, the District has not unlawfully diverted the bargaining unit work of teaching health to Brain Honey or its vendor. Also, the District has not unlawfully diverted bargaining unit work by giving physical education waivers for students who take the Brain Honey health course any more than it has with the waivers for vo-tech students.

Alternatively, even if the essential function and the basic duties of teaching health had not substantially changed as a result of introducing the Brain Honey technology, the

fact remains that the District has continued to utilize bargaining unit members (Ms. Blinn and Mr. Bauer) to work with the new technology to provide health instruction to students. Notwithstanding, therefore, whether the essential function of teaching health has been changed by the online technology, the duties and responsibilities of presenting health related materials to District students remains with the bargaining unit.

Accordingly, the Union did not meet its burden of proving that the District unlawfully removed bargaining unit work under Section 1201(a) (1) and (5), and the charge of unfair practices is dismissed in its entirety.

CONCLUSIONS

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

1. The District is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has not committed unfair practices within the meaning of Section 1201(a) (1) or (5).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 twenty-sixth day of August, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner