COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PALMERTON AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-10-4-E
PALMERTON AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On January 7, 2010, the Palmerton Area Educational Personnel Association, PSEA/NEA (Association), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Palmerton Area School District (District) violated section 1201(a)(5) of the Public Employe Relations Act (PERA) by "subcontracting of bargaining unit work without negotiation" when "supervisory and management staff" began taking inventory at Palmerton Area High School and Towamensing Elementary School. On January 19, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 28, 2010, if conciliation did not resolve the charge by then. The hearing examiner held the hearing as scheduled and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. By letter dated May 27, 2010, the Association waived its right to file a brief. On August 3, 2010, the District 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 March 26, 1998, the Board certified the Association as the exclusive representative of a bargaining unit that includes the District's maintenance/custodial and cafeteria employes. (Case No. PERA-R-98-4-E)

2. During the 2008-2009 school year, three members of the bargaining unit (head cook Karen Keck, assistant cook Margaret Versuk and custodian Travis Derr) inventoried the freezer, the refrigerator and the stock rooms at the kitchen in the District's high school one day in the last week of each month except for November, December and March when school was not in session. They were assisted by the food service director (Lynn Raup) for a company (Sodexho) managing the cafeteria under a subcontract with the District at the time. (N.T. 6-15, 20-21, 26-27, 33-34; District Exhibit 1)

3. At the beginning of the 2009-2010 school year, the food service director (Krista Avillion) for a new company (the Nutrition Group a/k/a Nutrition, Inc.) managing the cafeteria under a subcontract with the District directed Ms. Keck and Ms. Versuk not to take inventory and with Mr. Derr's assistance began taking inventory herself. Mr. Derr initially assisted her by taking inventory in the freezer. (N.T. 15-16, 19-20, 22-23)

4. In March 2010, Ms. Avillion took inventory at Towamensing Elementary School. (N.T. 25)

5. With the some time assistance of a "union" member (Lisa Fedder), another "union" member (Donna Rogowitz) usually takes inventory at Towamensing Elementary School. (N.T. 25)

DISCUSSION

The Association has charged that the District committed unfair practices under section 1201(a)(5) by "subcontracting of bargaining unit work without negotiation" when "supervisory and management staff" began taking inventory at Palmerton Area High School and Towamensing Elementary School. According to the Association, the District was under an obligation to bargain before subcontracting the inventory work because members of the bargaining unit had been performing that work on an exclusive basis for years.

The District contends that the charge should be dismissed (1) because "the work performed by the employees in question, the taking of inventory, has never been exclusive to the bargaining unit." Brief at 4. The District also contends that the charge should be dismissed (2) because "there is no evidence in the record, let alone substantial evidence, establishing any 'past practice' related to the taking of inventory beyond the 2008-2009 school year." Brief at 4-5. The District also contends that the charge should be dismissed (3) because any subcontract of bargaining unit work had a de minimus impact on employe terms and conditions of employment.

The applicable law

An employer commits an unfair practice under section 1201(a)(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); City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). 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).

Any finding of an unfair practice must be supported 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).

The charge as to Palmerton Area High School

The record shows that during the 2008-2009 school year three members of the bargaining unit (Ms. Keck, Ms. Versuk and Ms. Derr) inventoried the freezer, the refrigerator and the stock rooms at the kitchen in the District's high school one day in the last week of each month except for November, December and March when school was not in session and that they were assisted by the food service director (Ms. Raup) for a company (Sodexho) managing the cafeteria under a subcontract with the District at the time (finding of fact 2). The record also shows that at the beginning of the 2009-2010 school year the food service director (Ms. Avillion) for a new company (the Nutrition Group a/k/a Nutrition, Inc.) managing the cafeteria under a subcontract with the District directed Ms. Keck and Ms. Versuk not to take inventory and with the assistance of Mr. Derr began taking inventory herself and that Mr. Derr initially assisted her by taking inventory in the freezer (finding of fact 3).

On that record, it is apparent that the District changed the extent to which members of the bargaining unit (Ms. Keck, Ms. Versuk and Mr. Derr) and a non-member of the bargaining unit (Ms. Raup) had been performing the same work (taking inventory). Notably, prior to the 2009-2010 school year, Ms. Keck, Ms. Versuk, Mr. Derr and Ms. Raup all inventoried the freezer, the refrigerator and the stock rooms in the kitchen. At the beginning of the 2009-2010 school year, however, the new food service director (Ms. Avillion) alone inventoried the refrigerator and the stock rooms, while Mr. Derr only inventoried the freezer. Thus, under City of Jeanette, supra, the District must be found to have violated section 1201(a)(5). See also Wyoming Valley West School District, 32 PPER ¶ 32008 (Final Order 2008)(employer violated section 1201(a)(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 defense of the charge has merit.

The District first contends that the charge should be dismissed because "the work performed by the employees in question, the taking of inventory, has never been exclusive to the bargaining unit." Brief at 4. In support of its contention, the District points out that a non-member of the bargaining unit (Ms. Raup) had been taking inventory prior to the 2009-2010 school year. According to the District, it necessarily follows that

members of the bargaining unit had not been taking inventory on an exclusive basis. Under City of Jeanette, supra, however, work may be exclusive to a bargaining unit even though a non-member of the bargaining unit has been performing the same work. Thus, the District's contention finds no support in the law.

In further support of its contention, the District submits that cases like City of Jeanette, supra, which hold that an employer is under an obligation to bargain over a change in the extent to which members and non-members of the bargaining unit perform the same work, are inconsistent with cases like Mars Area School District, supra, which hold that an employer is under an obligation to bargain over the transfer to non-members of a bargaining unit of work that members of the bargaining unit previously performed on an exclusive basis. According to the District, work cannot be exclusive to the bargaining unit if a non-member of the bargaining unit has performed it, too. The District invites the hearing examiner to "reject" the holdings in cases like City of Jeanette, supra. Brief at n. 2. A hearing examiner is no position to "reject" a holding of the courts, however. Thus, as far as the hearing examiner is concerned, cases like City of Jeanette, supra, are controlling.

The District next contends that the charge should be dismissed because "there is no evidence in the record, let alone substantial evidence, establishing any 'past practice' related to the taking of inventory beyond the 2008-2009 school year." Brief at 4-5. The District apparently believes that work must be performed by members of the bargaining unit for more than a year in order to be bargaining unit work. The District cites no authority holding that work must be performed by members of the bargaining unit for more than a year in order to be bargaining unit work, however. Moreover, in City of Allentown, supra, where the court found work performed by members of the bargaining unit to be bargaining unit work, the court placed no minimum on the length of time work must be performed by members of the bargaining unit in order to be bargaining unit work. Thus, the District's contention finds no support in the law.

The District lastly contends that the charge should be dismissed because any subcontract of bargaining unit work had a de minimus impact on employe terms and conditions of employment. In support of its contention, the District points out that Ms. Keck, Ms. Versuk and Mr. Derr worked a limited number of hours taking inventory. There is no de minimus standard to be applied in a case of this nature, however. Under City of Harrisburg, supra, an employer must bargain over the transfer of "any" bargaining unit work to non-members of the bargaining unit. 605 A.2d at 442 (emphasis in original). Thus, the District's contention finds no support in the law.

The charge as to Towamensing Elementary School

The record shows that in March 2010 a non-member of the bargaining unit (Ms. Avillion) took inventory at Towamensing Elementary School (finding of fact 4). The record also shows that a "union" member (Ms. Rogowitz), with the some time assistance of another "union" member (Ms. Fedder), usually takes inventory at Towamensing Elementary School (finding of fact 5).

Noticeably absent from the record is any evidence that inventory was being taken by anyone, let alone members of the bargaining unit, at the time the charge was filed. Also noticeably absent from the record is any evidence that members of the bargaining unit had been taking inventory before Ms. Avillion did.

On that record, there is no basis for finding that the District subcontracted bargaining unit work to managerial or supervisory personnel as charged.

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 an unfair practice under section 1201(a)(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 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.

2. Take the following affirmative action:

a. Rescind the transfer to the food service director of the inventory work previously performed by Ms. Keck, Ms. Versuk and Mr. Derr;

b. Reinstate that work to the bargaining unit;

c. Make Ms. Keck, Ms. Versuk and Mr. Derr whole for any loss of pay suffered by them as the result of the transfer to the food service director of the inventory work previously performed by them;

d. Pay interest at the simple rate of six per cent per annum on the pay due Ms. Keck, Ms. Versuk and Mr. Derr from the date they were to have been paid to the date they are paid;

e. 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

f. 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 August 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner