

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ROCHESTER AREA EDUCATION :  
ASSOCIATION PSEA/NEA :  
 :  
v. : Case No. PERA-C-09-448-W  
 :  
ROCHESTER AREA SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On November 12, 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 Employe Relations Act (PERA), by allegedly eliminating the supplemental position of induction coordinator and assigning those duties to non-bargaining unit administrators.

On December 2, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 14, 2010, in Pittsburgh, Pennsylvania. By letter dated December 28, 2009, I consolidated this case for hearing purposes only with a previously scheduled hearing involving the same parties and a different charge (PERA-C-09-411-W). Both hearings were held on March 31, 2009. 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. (Transcript for PERA-C-09-411-W; N.T. 5).
2. The Union is an employee organization within the meaning of Section 301(3) of PERA. (Transcript for PERA-C-09-411-W; N.T. 5).
3. Kim Inman is a bargaining unit member and had been the induction coordinator since late in the 2004-2005 school year prior to the District's elimination of the position at the beginning of the 2009-2010 school year. The induction coordinator was a supplemental position for which Ms. Inman received a stipend of \$662.00. (N.T. 6, 7, 14; Association Exhibit 1 at 33).
4. The parties' collective bargaining agreement (CBA) provides, in relevant part, as follows:

L. Supplementals

The official list of compensated supplemental(s) is incorporated for illustrative and record purposes only, documenting the compensation to be applied to the current approved list.

1. Effective August 16, 2007 all listed supplementals shall be increased by 3.5% over current compensation.
2. The district reserves the right in its sole discretion to add, delete or modify any named and recognized supplemental activity or program at any time. There is no restriction as to who the district may recruit, offer or select to carry out the function(s) for any supplemental. However, if the district maintains any supplemental(s) as listed, the compensation for same shall be in accordance with the above. This provision is

not grievable under the terms of this agreement except as to proper compensation.

. . . . .

(Association Exhibit 1 at 12).

## DISCUSSION

In its post-hearing brief, the Union argues that the District wrongfully eliminated the position of induction coordinator and reassigned the duties exclusively performed by the induction coordinator to District administrators without attaining agreement from the Union. The District, however, argues that the CBA authorized its elimination of the induction coordinator position and its reassignment of the work to administrators. I agree with the District.

In Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993), the Commonwealth Court recognized that a Union may waive its right to bargain certain changes in terms or conditions of employment where the parties' contract language demonstrates that the Union clearly and unmistakably waived its right to bargain those changes. In this case, the parties' CBA expressly provides that the "[t]he District reserves the right in its sole discretion to add, delete or modify any named and recognized supplemental activity or program at any time. There is no restriction as to who the district may recruit, offer or select to carry out the function(s) for any supplemental." (F.F. 4) (emphasis added). I conclude that the above-quoted contract language constitutes a clear, unambiguous, unmistakable and unequivocal waiver of the Union's right to bargain any changes to the position of induction coordinator or the reassignment of that work.

Alternatively, in Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority (SEPTA), 35 PPER 73 (Final Order, 2004), the Board outlined the doctrine of contractual privilege, which is also commonly known as "sound arguable basis." Accordingly, the SEPTA Board opined as follows:

In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M. 1516 (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER ¶ 28200, at 433 (Final Order, 1997). The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlth. 2000). "The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained for agreement, for the claim that the employer's action was permissible under the agreement." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a 'sound arguable basis' for its interpretation and a 'substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, the Board "will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

SEPTA, 35 PPER at 229. At a minimum, the above-quoted contract language provides a sound arguable basis for the District's elimination of the induction coordinator position and its reassignment of that work, within the meaning of Jersey Shore and SEPTA.

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 first day of September, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner