COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PITTSTON AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-14-283-E
PITTSTON AREA SCHOOL DISTRICT	:	

FINAL ORDER

Pittston Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on March 8, 2016, challenging a Proposed Decision and Order (PDO) issued on February 17, 2016. The District excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by (1) unilaterally changing the extent to which non-bargaining unit supervisors perform maintenance repair projects and yard work and (2) failing to comply with a Memorandum of Agreement regarding snow removal. Pursuant to an extension granted by the Secretary of the Board, the Pittston Area Educational Support Personnel Association (Association) filed a response to the exceptions and brief on April 11, 2016.

The facts of this case are summarized as follows. The Association is the exclusive bargaining representative of all full-time and regular part-time blue collar nonprofessional employes including maintenance, custodial, and cafeteria workers and bus drivers. For the past 15 years, the maintenance employes have maintained and repaired the District's equipment, machinery, buildings and facilities; plowed and removed snow; cut the grass, trimmed shrubbery, removed weeds, fertilized fields and grasses, raked leaves, and maintained and lined the athletic fields; and delivered equipment and machinery to the various school buildings. The District has a Primary Center for kindergarten and first grade, an Intermediate Center for grades 2 through 6, a Middle School for grades 7 and 8 and a High School for grades 9 through 12. There was also a Kindergarten Center, which the District recently sold.

James Serino has been the District's Maintenance Director, a non-bargaining unit position, for approximately 10 years. Kenneth Bangs has been the District's Maintenance Supervisor, a non-bargaining unit position, since July 2014. Before July 2014, Mr. Bangs was a bargaining unit maintenance worker. The previous Maintenance Supervisors were James O'Brian and Bobby Starina. Mr. O'Brian held the Maintenance Supervisor position for eleven and a half months and Mr. Starina held the position for 25 years.

Before July 2014, Mr. Serino assisted bargaining unit maintenance employes on repair projects requiring more than one person. This occurred a couple of times per year. Mr. Serino also performed yard work by assisting bargaining unit maintenance employes with cutting grass, removing weeds and working on the fields in preparation for graduation. Mr. Serino did not perform any repair project or yard work without the assistance of bargaining unit maintenance employes, but merely assisted the maintenance workers in these tasks.

Before July 2014, Mr. O'Brian and Mr. Starina assisted bargaining unit maintenance employes on repair projects, cutting the grass and yard work. Mr. O'Brian and Mr. Starina did not perform this work without the assistance of bargaining unit maintenance employes.

Since July 2014, Mr. Serino and Mr. Bangs have been cutting the grass on the football field at the high school by themselves without the assistance of any bargaining unit maintenance employes. They have also been repairing and maintaining District vehicles and machinery, such as a dump truck, lawn mowers and tractors without the assistance of any bargaining unit maintenance employes.

In 2010, the parties executed a Memorandum of Agreement (MOA), which resolved a prior charge of unfair practices. The MOA provides as follows:

> 1. All eligible, qualified Association employees shall be offered the opportunity to [sic] overtime snow removal duties.
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> 2. Non-bargaining unit members shall be permitted to engage in snow removal if there is no bargaining unit member available for snow removal and/or in exigent circumstances.
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> 3. The use of non-bargaining unit employees in snow removal shall not serve to reduce, replace or displace bargaining unit positions or work, or [sic] shall it affect the exclusivity of bargaining unit work.
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> 4. This Agreement shall not set a precedent, serve as a past practice or a waiver of any Association rights in regards to the exclusivity of any bargaining unit work or positions.
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> 5. The Association and the District reserve their respective rights under the provisions of their Collective Bargaining Agreement. This Agreement contains the entire agreement among the parties and there are no other terms, conditions, promises or understandings, oral or written, relating to the subject matter of this Agreement and the unfair labor charge filed before the Board to No. PERA-C-10-241-E which the Association shall dismiss with prejudice upon execution hereof.
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> 6. The parties have received all necessary approvals and authorizations necessary to enter this Agreement.

Although there are approximately 43 part-time employes in the bargaining unit, the District typically called only the full-time employes to clear snow, and did not regularly call any part-time bargaining unit employes to work on days when there was accumulated snow in 2014 and 2015. Mr. Serino and Mr. Bangs regularly performed snow removal at the high school in the fall of 2014 and winter of 2015. Mr. Serino and Mr. Bangs operated the snow plows each time it snowed and whenever there was any accumulation of snow on the ground.

The Association did not consent to the District's assignment of bargaining unit work to either Mr. Serino or Mr. Bangs. The District never attempted to bargain the issue with the Association. Nor did the District inform the Association that it was assigning the work to Mr. Serino and Mr. Bangs.

The Association filed its Charge of Unfair Practices on August 29, 2014, alleging that the District violated Section 1201(a)(1), (2) and (5) of PERA by assigning the work of the maintenance employes to non-bargaining unit supervisors. A hearing was held before the Board's Hearing Examiner on September 23, 2015, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of PERA when Mr. Serino and Mr. Bangs performed repair projects and yard work without the assistance of bargaining unit maintenance employes and performed snow removal contrary to the provisions in the parties' MOA.[1] By way of remedy, the

[1] The Hearing Examiner also concluded that the District did not violate Section 1201(a)(1) and (5) of PERA with regard to the work of transporting equipment because the Association failed to prove that Mr. Serino and Mr. Bangs delivered equipment and machinery without the assistance of bargaining unit maintenance employes. Nor did the Hearing Examiner find a violation of Section 1201(a)(2) of PERA because no evidence was presented to

Hearing Examiner ordered the District to return the work at issue to the bargaining unit, to restore the status quo and to make whole any bargaining unit employes who were adversely affected by the District's actions.

In its exceptions, the District alleges that the Hearing Examiner erred in finding that it violated Section 1201(a)(1) and (5) of PERA because the Association failed to prove that the bargaining unit maintenance employes exclusively performed repair projects and yard work. Rather, the District alleges that the Maintenance Director and previous Maintenance Supervisors have always assisted the maintenance employes in performing those duties.

The District's exceptions primarily challenge the Hearing Examiner's findings of fact and assert that certain findings are not supported by substantial evidence in the record. Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufmann Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Further, absent compelling circumstances, the Board will defer to its Hearing Examiner's credibility determinations supporting findings of fact. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). Upon review of the record, there are no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations and the resultant Findings of Fact are supported by substantial evidence. Accordingly, the District's exceptions to the Hearing Examiner's factual findings are dismissed.

With regard to the Hearing Examiner's conclusion that the District violated Section 1201(a)(1) and (5) of PERA, a public employer commits an unfair practice when it transfers any bargaining unit work outside the unit without first bargaining with the employe representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). An employe representative bears the burden of proving that an employer unilaterally transferred or removed work from the bargaining unit. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). A removal of bargaining unit work may occur (1) when an employer unilaterally removes work that is exclusively performed by the bargaining unit or (2) when an employer alters a past practice regarding the extent to which bargaining unit employes and non-bargaining unit employes perform the same work. City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006)(citing AFSCME, Council 13, AFL-CIO v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)).

The issue presented here is whether the District changed the extent to which the Maintenance Director and Maintenance Supervisor performed repair projects and yard work. In this regard, the Board recognized in Woodland Hills Educational Support Personnel Association, PSEA/NEA v. Woodland Hills School District, 40 PPER 135 (Final Order, 2009), as follows:

> As was aptly stated in Fraternal Order of Police Lodge No. 9 v. City of Reading, 32 PPER ¶ 32158 [at 388] (Proposed Decision and Order, 2001), where work that was previously shared by bargaining unit and non-bargaining unit employes was unilaterally assigned by the employer exclusively to non-bargaining unit employes:
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> > [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 employes is significant and constitutes ... [an] unfair labor practice.

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support a finding that the District assisted or controlled the Association to the point that its independence was questioned. No exceptions were filed by the Association to the Hearing Examiner's decision regarding these issues. 34 Pa. Code § 95.98(a)(3)("[a]n exception not specifically raised shall be waived").

Id. at 444.

Similarly here, the Hearing Examiner found that the District unilaterally transferred the work at issue in violation of Section 1201(a)(1) and (5) of PERA, stating as follows:

> [T]he record shows that, before July 2014, the District's Maintenance Director and previous Maintenance Supervisors performed various Maintenance work at times, including repair projects and yard work, but only by assisting or working in cooperation with bargaining unit employes, who were also engaged in the same tasks at the same time. The record shows that the Maintenance Director and the previous Maintenance Supervisors did not perform the Maintenance work alone or without the assistance and/or cooperation of the bargaining unit employes. However, the record shows that after July 2014, the Maintenance Director and current Maintenance Supervisor have been performing repair projects and yard work by themselves and without assisting or working in conjunction with any bargaining unit members. The Association did not consent to the District assigning bargaining unit work in this fashion to either the Maintenance Director or the Maintenance Supervisor. In fact, the District never attempted to bargain the issue with the Association.

(PDO at 5). The Hearing Examiner's findings are supported by substantial evidence of record. Based on those findings, the Hearing Examiner did not err in concluding that the District altered the past practice regarding the extent to which the work was shared when Mr. Serino and Mr. Bangs performed repair work and yard work without the assistance of any bargaining unit employes. See Woodland Hills School District, supra. Therefore, the District's exceptions to the finding of a violation of Section 1201(a)(1) and (5) of PERA for an unlawful removal of bargaining unit work must be dismissed.

The District next alleges that the Hearing Examiner erred in finding that it violated the MOA because the Maintenance Director and previous Maintenance Supervisors participated in snow removal in the past. A public employer is required to comply with the provisions of an agreement which settles an unfair practice charge. See Avery v. PLRB, 509 A.2d 888 (Pa. Cmwlth. 1986); see also United Steelworkers Local 9305 v. Ambridge Water Authority, 43 PPER 86 (Final Order, 2011); FOP Lodge 27 v. Springfield Township, 42 PPER 20 (Final Order, 2011). Directly contrary to the District's argument, the MOA expressly negates the past practice argument by providing that "[t]his Agreement shall not set a precedent, serve as a past practice or a waiver of any Association rights in regards to the exclusivity of any bargaining unit work or positions."

Further, notwithstanding any practices, the MOA states that the District will, among other things, offer "[a]ll eligible, qualified Association employees" the opportunity for overtime snow removal duties and states that non-bargaining unit employes "shall be permitted to engage in snow removal if there is no bargaining unit member available for snow removal and/or in exigent circumstances." As the record indicates, Mr. Serino and Mr. Bangs performed snow removal duties every time it snowed in the fall of 2014 and winter of 2015. The fact that the Maintenance Director and previous Maintenance Supervisors assisted in snow removal in the past does not negate the provision in the parties' MOA requiring that all eligible, qualified bargaining unit members be provided with the opportunity to perform snow removal prior to Mr. Serino or Mr. Bangs assisting in that work. The credited record evidence supports the Hearing Examiner's finding that Mr. Serino acknowledged that part-time bargaining unit employes were not always contacted and provided with the opportunity to perform snow removal. Accordingly, the Hearing Examiner did not err in concluding that the District failed to comply with the MOA.

Furthermore, we agree with the Hearing Examiner that the MOA, an agreement between the Association and District regarding calling bargaining unit employes into work to perform snow removal, cannot be negated by the District unilaterally deciding that every snowfall creates an emergency situation requiring management personnel to participate in snow removal. As aptly recognized by the Hearing Examiner:

> As the Association points out, there is absolutely no language in the MOA which could even arguably support the notion that the Association expressly and intentionally authorized the District … to utilize two non-bargaining unit employes to perform snow removal duties each and every time it snowed and there was any accumulation on the ground. Indeed, such a reading of the provision would allow the exception in the second paragraph of the MOA to swallow the rule that appears in the first paragraph of the MOA. To be sure, the first provision of the MOA, which requires the District to offer overtime snow removal duties to all eligible and qualified Association employes, would be rendered meaningless if the District was permitted to utilize multiple non-bargaining unit employes for the same snow removal duties instead of bargaining unit members anytime it snowed and there was any accumulation on the ground. In any event, the record is devoid of any evidence that the District considered any accumulation of snow or ice to be an exigent circumstance, or how it was an exigent circumstance, justifying its use of non-bargaining unit personnel to perform the snow removal duties. The District offered no explanation whatsoever during the testimony of its witnesses regarding how the accumulation of any snow or ice was such an emergency that it was prevented or precluded from offering the work to the part-time employes in the bargaining unit.

(PDO at 7). As such, the Hearing Examiner properly concluded that the District failed to comply with the parties' MOA in violation of Section 1201(a)(1) and (5) of PERA.

The District also excepts to the remedy issued by the Hearing Examiner. In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action … as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). It is within the Board's discretion to determine the appropriate relief for an employer's unfair practices. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994).

Initially, we note that it is premature for evidence of damages to be presented prior to a finding of an unfair practice. FOP, Lodge 5 v. City of Philadelphia, 26 PPER ¶ 26114 (Final Order, 1995). Thus, the fact that the Association has not yet established the extent of the bargaining unit members' monetary losses caused by the District's removal of bargaining unit work is immaterial, as the Association was not required to prove damages at the hearing on the issue of whether the District committed an unfair practice under Section 1201(a)(1) and (5) of PERA. Id.[2] Indeed, for purposes of an unlawful removal of bargaining unit work, the bargaining unit's loss of the work itself is sufficient for the finding of an unfair practice. AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Office of Administration, 20 PPER ¶ 20005 (Final Order, 1988), affirmed sub. nom. Commonwealth of Pennsylvania v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990).

[2] Any question concerning the eligibility of an employe to receive compensation as make whole relief may, if necessary, be addressed through compliance proceedings before the Board. Teamsters Local Union No. 205 v. Munhall Borough, 40 PPER 102 (Final Order, 2009).

The District's allegation that the Hearing Examiner's remedy is improper because it requires the District to reimburse all forty-three part-time bargaining unit employes for overtime snow removal demonstrates a fundamental misunderstanding of the Board's remedial order. Indeed, as reflected in the record and the PDO, by operating the snow plows whenever there was an accumulation of snow, Mr. Serino and Mr. Bangs displaced two, not forty-three, bargaining unit members from performing snow removal duties. Therefore, the Board finds the remedy issued by the Hearing Examiner is remedial and in furtherance of the purposes and policies of PERA to restore the status quo and to make any affected bargaining unit members whole for damages, if any, suffered due to the unlawful actions of the District. See Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 34 (Final Order, 2010).

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA by (1) unilaterally changing the extent to which non-bargaining unit supervisors perform maintenance repair projects and yard work and (2) failing to comply with the Memorandum of Agreement regarding snow removal. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Pittston Area School District are hereby dismissed, and the February 17, 2016 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twentieth day of September, 2016. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PITTSTON AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-14-283-E
PITTSTON AREA SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1) and (5) of the Public Employe Relations Act; that it has restored the status quo and returned the maintenance repair work, yard work, and snow removal work to the bargaining unit; that it has ceased its failure to comply with the Memorandum of Agreement regarding snow removal; that it has made whole any bargaining unit employes adversely affected by the District's unfair practices; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on the Association at its principal place of business.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public