COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| ALLEGHENY COUNTY PRISON EMPLOYEES INDEPENDENT UNION, | : | |
| v. | : | Case No. PERA-C-22-142-W |
| COUNTY OF ALLEGHENY | : | |

**FINAL ORDER**

The County of Allegheny (County) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on March 10, 2025, challenging a Second Proposed Decision and Order (PDO) issued on February 18, 2025. In the PDO, the Board's Hearing Examiner concluded that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally removing work that has been exclusively performed by Corrections Officers (COs) and assigning that work to sergeants. The Allegheny County Prison Employees Independent Union (Union) filed a response to the exceptions, and supporting brief in opposition thereto, on March 25, 2025.

This matter arose on June 2, 2022, when the Union filed a Charge of Unfair Practices, as amended on September 1, 2022, alleging that the County violated Section 1201(a)(1) and (5) of PERA by unilaterally transferring bargaining unit work to sergeants (who are not in the bargaining unit), which deprived the COs of overtime work and pay. On June 22, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning this matter to a Hearing Examiner. A hearing was held before the Hearing Examiner on December 7, 2022, 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.

On July 21, 2023, the Hearing Examiner issued a Proposed Decision and Order, concluding that the County had committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA by assigning sergeants to perform the exclusive work of the COs of control booth, nighttime sanitation, lunch relief, Rayburn kitchen detail, floor control, special kitchen detail, intake, escort, and special electric detail on numerous occasions between April 17, 2022, to August 23, 2022. Specifically, the Hearing Examiner held that removal of bargaining unit work is a mandatory subject of bargaining and that the County failed to present sufficient evidence of bargaining. The Hearing Examiner further dismissed the County's exigent circumstances argument, holding that the circumstances, claimed exigent by the County, were "foreseeable, systemic, and structural," as the corrections officers' staffing shortage has been an ongoing issue within the County Jail. (PDO, 7/21/2023 at 8). Therefore, the Hearing Examiner ordered the County to return the exclusive bargaining unit work at issue back to the bargaining unit.

On August 10, 2023, the County filed exceptions with the Board, challenging the Hearing Examiner's conclusion in the July 21, 2023 PDO that it committed an unfair practice and asserting that it had a sound arguable basis in Article IV (Uninterrupted Operation and Continuous Service) of the

parties' collective bargaining agreement to assign sergeants to perform the bargaining unit work of the COs. On March 19, 2024, the Board issued an Order Directing Remand to the Hearing Examiner for Further Proceedings (Remand Order). The Remand Order vacated the conclusion in the July 21, 2023 PDO that the County had violated PERA and remanded the matter back to the Hearing Examiner for further proceedings and reopening of the record for the inclusion of additional evidence including, but not limited to, the complete collective bargaining agreement (CBA) between the parties for the limited purpose of addressing the County's "contractual privilege" defense. A hearing was held on November 20, 2024, at which time the parties offered evidence including the admission of their CBA. Post-hearing briefs were filed by both parties, after which the Hearing Examiner issued a Second Proposed Decision and Order on February 18, 2025.

The salient facts of this case are summarized as follows. COs are responsible for the care, custody and control of the inmate population at the Allegheny County Jail (ACJ).[1] The Union represents the COs, but not sergeants, who are first-level supervisors.[2] (FF 3). The ACJ has multiple levels, from the ground floor to level 8, which are staffed by three (3) shifts of COs. (FF 4, 5). The ACJ has a lack of COs to fill all job functions on each shift.[3]

COs are entitled to lunch breaks of one hour. A "lunch relief" shift is when a CO fills in for another CO who is on lunch break. Lunch relief duties have always been performed by COs in the bargaining unit. (FF 7). On May 20 and 21, 2022, a sergeant was assigned and performed the lunch relief duty at the ACJ on the third shift. Additionally, on August 21, 2022, sergeants were assigned and performed the lunch relief shifts at the ACJ on the first shift. (FF 8).

The central control booth monitors the ACJ, including all the housing units, and the parking lot, in addition to providing entry into the facility. This work has always been performed by the COs. Typically, four (4) COs are assigned to work in the central control booth. (FF 10). On April 17, 2022, the Union discovered a sergeant working in the control booth. (FF 11).

The nighttime sanitation detail requires COs to supervise inmates while they clean the ACJ's kitchen. This job duty has always been performed by bargaining unit members. However, the Union became aware that a sergeant had been assigned to the nighttime sanitation detail on several occasions in April of 2022. (FF 12).

The Rayburn kitchen detail is a job duty in which a CO supervises vendors and contractors who are working in the ACJ kitchen. This occurs frequently, but on an as needed basis; it is always performed by COs.

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[1] The parties are subject to a connected series of bargained agreements and interest arbitration awards. At the time relevant to this matter, the parties were subject to an interest arbitration award issued on September 10, 2020, which expired on December 31, 2023. (FF 30).

[2] Case No. PERA-R-96-149-W.

[3] The evidence of record reveals that this shortage is attributable to several factors, including the ACJ not hiring enough COs, the County promoting many COs to sergeant, and COs refusing to work mandatory overtime under certain specific conditions. (FF 28).

However, on May 24 and 25, 2022, and on August 23, 2022, a sergeant was assigned to perform this duty. (FF 13).

Floor control duty requires a CO to manage a desk in the middle of the inmates' housing units. This detail involves responding to "codes," handling attorney visits, monitoring cameras, assuring routine deliveries are made, completing logbooks, and supervising inmate transfers. The floor control duty has always been staffed by a CO. (FF 15). However, on May 25, 2022, a sergeant was assigned to and performed floor control duties on the second shift. Further, sergeants were assigned to work floor control duties on July 30, August 6, and August 13, 2022. (FF 16).

The intake detail involves, *inter alia*, processing incoming inmates and preparing them for admittance to ACJ, scheduling judicial hearings for inmates, searching and escorting inmates to holding cells and issuing uniforms to new inmates. Intake duties have always been performed by COs at the ACJ. (FF 18). However, on August 6, 2022, six (6) sergeants were assigned to work in the intake position. (FF 19).

The escort detail consists of taking inmates to and from medical intake, responding to "codes," and performing lunch relief, as needed. This job duty has always been accomplished by the COs. (FF 20). However, on August 20, 2022, a sergeant performed floor control and escort duties. (FF 21).

Special electric detail is a job duty in which a CO will escort a vendor or contractor through the jail to perform specific work in the ACJ. This duty has always been performed by COs. (FF 22). On August 23, 2022, a sergeant worked the special electric duty on first shift. (FF 23).

The County did not bargain with the Union when it assigned the sergeants to perform the work at issue. (FF 8, 11, 12, 16, 19, 21, 23). The Union has asked, but the County has not agreed, to bargain over the issue of assigning sergeants to perform the CO duties at the ACJ. (FF 26). Specifically, the Union is willing to bargain with the County over sergeants filling some duties when there are not enough COs available but would like some say on how sergeants are assigned so that COs can use seniority rights for bidding on positions. (FF 25).

When the ACJ is short on COs, there are two general methods for assigning additional COs who are not already working. At any time, COs can volunteer for overtime. The Desk Sergeant can then fill open duties on a shift with COs who have volunteered to work overtime. If there are still open duties and no available COs who have volunteered to work overtime, the Desk Sergeant can use a "force list" to mandate COs to work overtime, which can be refused in specific circumstances. In all instances cited by the Union where sergeants performed CO duties, the County had exhausted the volunteer overtime and force lists. (FF 27).

In the February 18, 2025 PDO, the Hearing Examiner again determined that the County violated Section 1201(a)(1) and (5) of PERA by unilaterally transferring exclusive bargaining unit work to non-unit employes. In particular, the Hearing Examiner concluded that the CBA did not set forth any language permitting a conclusion that the Union had waived its right to bargain over the transfer of its exclusive work from COs to sergeants. Furthermore, the Hearing Examiner held that none of the CBA's provisions created a sound arguable basis for determining that the parties had

previously negotiated over the diversion of bargaining unit work. Accordingly, the Hearing Examiner ordered the County to immediately return the work at issue to the bargaining unit.

The County excepts to the Hearing Examiner's conclusions on several grounds.[4] Initially, the County challenges numerous factual findings[5] of the Hearing Examiner and asserts that they are not supported by substantial evidence of record. It is well-settled that the Hearing Examiner's function is to resolve conflicts in evidence, make findings of fact from conflicting evidence, and draw inferences from those findings of fact. PLRB v. Kaufmann Department Stores, Inc., 29 A.2d 90 (Pa. 1942). The Hearing Examiner's decision will be upheld if the factual findings are supported by substantial and legally credible evidence, and the legal conclusions drawn from those facts are reasonable, and not capricious, arbitrary or illegal. Abington Transportation Association v. PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Lycoming County v. PLRB, 943 A.2d 333 (Pa. Cmwlth. 2007). The Board finds that the Findings of Fact at issue are supported by substantial evidence in the record and, therefore, the County's exception is dismissed.

The County further asserts that the Hearing Examiner erred by concluding that it had actually "removed bargaining unit work" from the COs. Specifically, the County claims that, because the ACJ had first exhausted all possibilities of staffing the various bargaining unit positions with COs, either through voluntary overtime or mandatory overtime, and was still left with essential positions open, the County had no choice but to use sergeants to fill in the gaps pursuant to its inherent managerial authority to "assign duties" at the ACJ.

In this case, however, a careful review of the record reveals that, on multiple occasions in the past, the County utilized solutions other than removing bargaining unit work from the COs to address the chronic understaffing which has existed at the ACJ since the Covid pandemic. For example, at the hearing on December 7, 2022, Union President Brian Englert testified that the ACJ had previously taken COs from intake to cover lunch relief duties if there were not enough COs to man all the essential positions. (N.T., 12/7/2022, 160-162). Further, Major Jason Batykefer stated that the ACJ has been locked down when the number of COs was insufficient to cover certain assignments. (N.T., 12/7/2022, 111-113). The Hearing Examiner found this testimony credible.[6] As such, the Hearing Examiner determined that

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[4] On August 10, 2023, the County filed its first set of exceptions to the Hearing Examiner's conclusions which are addressed here, in addition to the exceptions raised in the County's second set of exceptions filed on March 10, 2025.

[5] Specifically, the County excepts to Findings of Fact 9, 14, 17, 24, 28 and 30.

[6] The Commonwealth Court has recognized that it is the province of the Hearing Examiner to determine the credibility of witnesses and weigh the probative value of evidence presented at hearings. Xilas v. PLRB, 441 A.2d 513, 514 (Pa. Cmwlth. 1980). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers

the County's actions amounted to a removal of bargaining unit work rather than an assignment of duties.

In reaching this conclusion, the Hearing Examiner relied upon well-established precedent holding that the outsourcing of bargaining unit work is a mandatory subject of bargaining under Section 701 of PERA because its effect on wages, hours, and terms and conditions of employment far outweighs any considerations of managerial policy. PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978). The removal of any bargaining unit work is a *per se* unfair practice. City of Harrisburg v. PLRB, 605 A2d 440, 442 (Pa. Cmwlth. 1992). The key inquiry in determining if a bargaining violation has occurred is simply whether the bargaining unit lost work. Tredyffrin-Easttown Education Association v. Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011). In this case, it is undisputed that the job assignments at issue constituted exclusive bargaining unit work and the County transferred that work to sergeants who are not in the bargaining unit on multiple occasions.[7] Therefore, the Hearing Examiner did not err in determining that the County violated Section 1201(a)(1) and (5) of PERA by unilaterally removing bargaining unit work from the COs.

Next, the County asserts that due to "exigent circumstances" present at the ACJ on the dates in question, it was necessary to allow sergeants to perform work exclusive to the bargaining unit to maintain the continued care, custody and control of the inmate population, which is essential to its core public function. An exigent circumstance is a viable defense to a failure to bargain charge only where the employer establishes that the situation was not of its own creation, that it made a reasonable effort to avoid the situation and that complying with its bargaining obligations would be impossible as it would cause the employer to be unable to perform an essential public function. Nazareth Borough Police Association v. Nazareth Borough, 40 PPER 51 (Final Order, 2009); Mifflin County Educational Support Personnel Association, ESPA/PSEA/NEA v. Mifflin County School District, 38 PPER 37 (Final Order, 2007).

Here, a review of the record reveals that none of these elements were proven by the County. Indeed, the testimony in this case firmly establishes that the ACJ was chronically shorthanded. The County admits that, following the Covid pandemic, a staffing shortage exists because it has been unable to fill all positions available for COs at the ACJ to achieve a full complement. (N.T. 84, 111-113). Thus, as noted by the Hearing Examiner:

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Association v. Commonwealth of Pennsylvania, Department of Corrections (Pittsburgh SCI), 34 PPER 134 (Final Order, 2003).

[7] The record evidence does not support a finding that the regular duties of the sergeants ever included the work at issue or that the Union, by agreement or acquiescence, has created a binding past practice of shared work among the sergeants and COs. See AFSCME, Council 13, AFL-CIO v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)(no unfair practice found where employer's transfer of inspection work to counties was consistent with past practice). Even if such were the case, the substantial evidence of record establishes a material change in the extent to which sergeants performed the bargaining unit work at issue from April 17, 2022, to August 23, 2022. AFSCME, District Council 83 v. Center Township, 50 PPER 14 (Final Order, 2018)(employer committed an unfair practice by increasing the extent to which Township Supervisors performed bargaining unit work).

> [A] review of the exigent circumstances cases which involve removal of bargaining unit work show that the Board has found the exigent circumstances defense where there was a sudden, imminent, and accidental emergency where no bargaining-unit employe was available to perform the work. For example, in Pennsylvania State Police, [37 PPER 4 (Final Order, 2006)], the Board held that exigent circumstances existed where no member of the bargaining unit was available to provide training on short notice due to the abrupt retirement of the trainer for classes already scheduled. In Allegheny County, 48 PPER 3 [Proposed Decision and Order, 2016)], Hearing Examiner Pozniak found exigent circumstances when a sergeant escorted an inmate alone because the inmate was having chest pains and the escort CO was not available.
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> This case does not compare to those cases as the exigent circumstances claimed by the County are, by contrast, foreseeable, systemic and structural. The shortage of COs on shifts at the [ACJ] is not a fluke occurrence.

(PDO, 7/21/2023 at 7-8).

As observed by the Hearing Examiner, the scenario presented in the instant case is much more akin to that set forth in City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006). There, a police department had adequate notice of the need for an overtime assignment and was required by past practice to offer the overtime position to off duty patrol officers, but nevertheless, failed to do so, choosing instead to unilaterally transfer bargaining unit work to the Police Chief. Here, notwithstanding the County's awareness that it does not employ enough COs to staff all of the bargaining unit positions at the ACJ with COs at all times, and its prior knowledge that many of the COs working at the ACJ have obtained an ADA or FMLA excuse allowing them to refuse mandatory overtime,[8] the County refused to negotiate with the Union as to how to address this situation. Simply put, the County was aware that gaps in coverage of CO positions were bound to occur at the ACJ but did not give the COs any opportunity to bargain which, if any, of those positions the COs would be willing to give up when those inevitable gaps occurred, or how those gaps in coverage could be filled with COs. Accordingly, the County has failed to show that any exigent circumstances exist in this matter as the staffing shortages were a foreseeable and recurring problem at the ACJ and the County has not made reasonable efforts to avert the problem.

Finally, the County contends on exceptions that the Hearing Examiner erroneously rejected the County's "contractual privilege" argument. A refusal to bargain charge will be dismissed if the employer establishes that it had a sound arguable basis in claiming a contractual privilege for its action. Fraternal Order of Transit Police v. SEPTA, 35 PPER 73 (Final Order, 2004). To support a contractual privilege defense, the employer must establish that it "has a sound arguable basis for ascribing a particular meaning to [the] contract and [the employer's] action is in accordance with the terms of the contract as [the employer] construes it." North Cornwall

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[8] Pursuant to an interest arbitration award issued on September 10, 2020, Article VIII, Section 2, Subsection F (Overtime) was amended to permit COs on approved FMLA leave to refuse overtime without penalty for such refusal. (County Exhibit 14).

Township Police Association v. North Cornwall Township, 33 PPER ¶ 33054 at 114 (Final Order, 2002) (quoting Vickers, Inc., 153 NLRB 561 at 570 (Decision and Order, 1965)).

Here, the County points to Article IV (Uninterrupted Operation and Continuous Service) and Article XV (Management Rights) of the parties' CBA to support the claim that it had a "sound arguable basis" for interpreting the CBA to permit the unilateral transfer of bargaining unit work from COs to sergeants on various occasions in the spring and summer of 2022. Article IV of the parties' CBA provides, in relevant part, as follows:

> 1. The Union recognizes that it is absolutely necessary for the County to be operated on a twenty-four (24) hour, seven (7) day a week basis and that County's operations be properly manned.
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> 2. The Union, and the employees, accept the responsibility that every employee exerts every effort to assure that all shifts are properly manned at all times.

Further, Article XV provides:

> The County retains and reserves unto itself all inherent, statutory and other powers, rights, authority, duties and responsibilities of its management status -- including but not limited to those of operating, manning and securing its facilities, hiring, scheduling, directing, supervising and, for just cause, disciplining and discharging its employees -- which are not expressly modified or restricted by any specific and enforceable terms or conditions of these Agreement provisions.

(County Exhibit 14). The County argues that due to a shortage of COs, the ACJ found itself unable to staff the facility despite the Union's responsibility under the CBA to "exert[] every effort to assure that all shifts are properly manned at all times." As such, the County contends that the ACJ was permitted by Article IV (2) and Article XV of the CBA to unilaterally assign CO duties to sergeants to ensure that all shifts were covered in order to provide for the continuous care of its inmate population while ensuring the safety of the prison. However, the language in Article IV (2) does not support the County's interpretation that it was authorized to unilaterally assign bargaining unit work to the sergeants.

To further support its contractual privilege argument, the County cites to AFSCME District Council 83 v. Centre Area Transportation Authority (CATA), 53 PPER 31 (Proposed Decision and Order, 2021), as being analogous to the matter sub judice. However, as noted by the Hearing Examiner, CATA is readily distinguishable from the instant case, and therefore does not aid the County's argument. The hearing examiner in that case determined that a public employer was contractually privileged to eliminate two fixed bus routes operated by bargaining unit drivers and replace them with expanded non-bargaining unit service to customers through new technology which allowed them to utilize a phone app to call a ride. There is no similar elimination or alteration of the services being performed by the ACJ. Instead, this case involves the assignment of employes to perform existing services.

Here, there is no specific language in either of the provisions cited by the County which arguably addresses the reassignment of bargaining unit work. As such, the Hearing Examiner's conclusion that the vague "boilerplate"

provisions of Article IV and XV of the parties' CBA does not support the County's assertion that it had a "sound arguable basis" for believing that it was contractually privileged to assign sergeants to perform work historically performed by COs, or to cover CO duties with sergeants, where duties were reassigned within the COs bargaining unit. Therefore, the Hearing Examiner did not err in concluding that the County did not establish a contractual privilege to act in the manner it did from April 17, 2022, to August 23, 2022.[9]

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Hearing Examiner properly concluded that the County violated Section 1201(a)(1) and (5) of PERA when it unilaterally transferred exclusive bargaining unit work from COs to sergeants on numerous occasions in 2022 at the ACJ. Accordingly, the Board shall dismiss the County's exceptions and make the Second 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 the County of Allegheny are dismissed, and the February 18, 2025 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, Gary Masino, Chairman, and Albert Mezzaroba, Member, this seventeenth day of March, 2026. 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.

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[9] To the extent that the County is arguing that the Union waived its right to bargain over the assignment of work to the sergeants, the County has failed to point to any specific language agreed to by the parties to support such an argument. Allegheny County Prison Employees Independent Union v. Allegheny County, 52 PPER 69 (Final Order, 2020)(waiver of bargaining rights will only be found where the language relied upon by the employer shows a clear, unambiguous, unmistakable and unequivocal waiver regarding the subject matter at issue); see also Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983)("[A] union's waiver of the right to bargain on mandatory subjects during the term of an agreement will not be found in a boiler plate waiver clause alone.... Use of [such a] clause as a sword by one seeking to impose unilateral changes without first bargaining is not favored.").

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**AFFIDAVIT OF COMPLIANCE**

The County of Allegheny hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it immediately returned the control booth, nighttime sanitation detail, lunch relief, Rayburn kitchen detail, floor control, special kitchen detail, intake, escort, and special electric detail work to the bargaining unit; that it has posted a copy of the Proposed Decision and Order and Final Order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

_______________________________
Signature/Date

_______________________________
Title

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

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Signature of Notary Public