

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CHICHESTER EDUCATION ASSOCIATION :
PSEA/NEA :
 :
v. : CASE NO. PERA-C-21-279-E
 :
CHICHESTER SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On December 20, 2021, the Chichester Education Association (Union, Association or CEA) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Chichester School District (District) violated Section 1201(a) (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that the District unilaterally diverted the bargaining unit work of the In-School Suspension Coordinator (ISSC) at the Middle School to a non-bargaining unit "Administrator," and refused to bargain the matter.

On March 9, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of Wednesday, May 18, 2022, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On August 23, 2022, the Union filed its post-hearing brief. The District filed its post-hearing brief on August 26, 2022.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)

3. Nancy Dunn is a Middle School Spanish teacher at the District, and she is the President of the Association. (N.T. 14-15)

4. In 2019, Justin Shivone was a 7th-grade social studies teacher at the Middle School in the bargaining unit. Prior to June 2019, he developed a proposal for the ISS program. The Shivone proposal stated, in relevant part: "Lunch detentions, afterschool detentions, and Saturday school detentions are never attended, and hours continue to pile up. These actions effectively render the discipline system obsolete and there is no change in behavior for an entire segment of students." On June 19, 2019, the District posted the position of ISSC for a bargaining unit member. At a "Committee-of-the-Whole" meeting among school board members on September 10, 2019, the school board awarded the position of ISSC to Mr. Shivone for the 2019-2020 school year, and he resigned his 7th-grade social studies teaching position. He held the ISSC position for 2 school years until June 2021, as a bargaining unit member. (N.T. 16-17, 46, 53-54, 63, 71-72, 86-87; Joint Exhibits 10-12, 18)

5. While Mr. Shivone was the ISSC, he was compensated under the parties' collective bargaining agreement (CBA). He had access to the grievance procedure under the CBA; he was paid pursuant to the salary structure under the CBA; and his terms of employment were governed by the CBA. (N.T. 63)

6. There is no evidence that Mr. Shivone's original ISSC proposal, which contains a list of job duties, was officially adopted by the school board, but he performed many of the duties contained therein. The job duties contained in the proposal included, but were not limited to the following: Providing a safe, structured and productive environment for academic progress; arranging continuous flow of academic and character education/mentoring; coordinating mentoring with a school counselor and/or child study team; coordinating character education assignments that engage the student in self-reflective exercises; collecting work from and returning it to teachers; filing reports with the assistant principal about individual students' behavior, academic performance, character education results, and any additional disciplinary consequences. The record demonstrates that Mr. Shivone performed these duties, however, there is no evidence that he filed reports. (N.T. 48-50; Joint Exhibit 10)

7. When Mr. Shivone became the ISSC, the District hired a new teacher to fill his vacant social studies teaching position. (N.T. 29)

8. Mr. Shivone developed the ISS program so that suspended students could receive educational services at the Middle School instead of staying home. The ISSC ensured that ISS students perform teacher provided assignments, answered questions from ISS students about their assigned work, provided character education, and reflected with students about the reasons for their in-school suspension. (N.T. 16-17, 24-25, 68-69)

9. On June 22, 2021, the District promoted Mr. Shivone to Dean of Students, which is an administrative, non-bargaining unit position. Under the parties' CBA, new and vacant positions in the bargaining unit must be posted. On June 3, 2021, the District posted the vacancy for the Middle School ISSC position, stating that the position was available for the 2021-2022 school year. (N.T. 19-20, 75-76; Joint Exhibits 3, 4 & 13)

10. The email attaching the posting for the ISSC position also included a notification of vacancies for the positions of supply clerk, family and consumer science, autistic support teacher, and class B maintenance. The email notification was sent to Association members and individuals who could be interested in, or qualified for, supply clerk and class B maintenance. It is not determinable whether administrators received the email. The attached posting itself is addressed to "All Staff." (N.T. 19-20; Joint Exhibits 3 & 4)

11. Steve Chase is a Middle School teacher who applied for the vacant ISSC position. Mr. Chase sent a letter of interest to the District's Human Resources Director, Fred Serino. He was interviewed for the position and received a phone call from the Human Resources Director that he was awarded the position, subject to school board approval. (N.T. 21-22, 88, 91)

12. In-school suspension at the High School operates differently than at the Middle School. At the High School, bargaining unit members have a duty period during which they are not teaching a class, and they can be assigned a duty by the administration, such as cafeteria duty or hall monitoring duty.

High School teachers are also assigned to cover in-school suspension so those students have access to a teaching professional. At the change of periods throughout the day, a different teacher rotates into the in-school suspension room at the High School. Saturday in-school suspensions existed only at the High School level. (N.T. 32-34, 68)

13. Dr. Daniel Nerelli is the Superintendent for the District. Dr. Gregory Puckett is an Assistant Superintendent. On August 18, 2021, Dr. Puckett emailed staff a letter from Dr. Nerelli informing staff that an administrator would be placed in the ISSC position, which had been renamed the "Administrator for Restorative Practices," beginning August 24, 2021. (N.T. 23, 26, 67; Joint Exhibit 5)

14. Dr. Nerelli's letter provides, in relevant part, as follows:

Mr. Stankavage will be transitioning to a new role as the Administrator for Restorative Practices, beginning August 24th. Mr. Stankavage has been an employee in the Chichester School District since 1993 and has been the high school principal since 2014. In his new role as Administrator for Restorative Practices, Mr. Stankavage will be overseeing the In-School Suspension Program at the MS, while working with the Equity Committee on collecting and analyzing data as it relates to the district's equity work. While the district begins the search process for a new high school principal, Mr. Donald Morgan will be the interim principal at the high school. . . .

(Joint Exhibit 5)

15. The District believed it needed an administrator to facilitate the ISS program to effectuate more "restorative practices," to oversee K-12, to develop an "equity program," and to coordinate "youth court." Youth court is where a teacher instructs a student and his/her parents on the judicial system in lieu of receiving discipline. The equity program facilitates the same opportunities for all students based on their individual circumstances. Restorative practices explores a student's individual background as a possible reason for his/her behavioral dysfunction in a District where 66% of students are economically disadvantaged and many have only 1 parent or grandparent responsible for them. (N.T. 76-78, 83-84, 100)

16. The Union and the District did not reach an agreement regarding the assignment of ISSC duties to the "Administrator for Restorative Practices." (N.T. 26, 34)

17. The Union proposed to the administration the placement of time limits on the transfer of ISSC duties to an "Administrator," as an accommodation for circumstances involving Mr. Stankavage, and proposed returning the position to the bargaining unit after one school year. (N.T. 26-27)

18. When an administrative position becomes vacant or is created, practice and procedure require that the District post the administrative position. The District did not post the position of "Administrator for Restorative Practices." (N.T. 32)

19. On September 15, 2021, Union President Dunn emailed Dr. Nerelli, in relevant part, as follows:

The Association would like to formalize the situation involving the CEA position of middle school ISS coordinator.

As we have previously discussed, the Association has not agreed to the permanent or long-term loss of the ISS Coordinator position at Chichester Middle School. Given the circumstances involved in Mr. Stankavage's transfer to the Middle School in the capacity of an administrator on special assignment, the Association is willing to discuss the temporary loss of the bargaining unit position if the following conditions are agreed to, in a MOU, signed by both parties.

The terms are as follows:

Mr. Stankavage may remain in the position for the remainder of the 2021-2022 school year. After the 2021-2022 school year, the position reverts back to the bargaining unit.

Mr. Chase, bargaining unit member, may transfer into the position if he so desires. If he declines, then the position shall be posted internally and shall remain a bargaining unit position. Mr. Stankavage shall not be transferred to the high school in a supervisory capacity of any kind.

This would constitute a one-time agreement. The Association maintains its right to the bargaining unit work.

(Joint Exhibits 6 & 7)

20. On September 21, 2021, the school board approved the job description for the position of "Administrator for Restorative Practices" as a 12-month position. School psychologists, school counselors, and teachers are not 12-month employees. Counselors and psychologists work 10 days per year more than teachers. (N.T. 80-81, 93; Joint Exhibit 14)

21. On October 1, 2021, Dr. Nerelli emailed his response to President Dunn, in relevant part, as follows:

We have reviewed your position regarding the Middle School ISS position internally, and with legal counsel. Please let me point out that the position that Mr. Stankavage is presently occupying is not the same position as the Middle School ISS Coordinator position. First it is a district wide position across all grades and schools. Second, Mr. Stankavage is engaging as an administrator in restorative practices and not merely coordinating ISS in a single building. Third, while a specific Middle School ISS bargaining unit position is not currently being utilized, we have added a lead teacher at Hilltop and two new cyber academy positions without reducing any teachers. Overall, this is a net gain for the Association. Therefore, we don't feel the type of MOU you are proposing is necessary or appropriate, and respectfully decline your request.

(Joint Exhibit 7)

22. Section 301 of the District's policy manual provides that all positions at the District shall be created and established by the school board to provide effective leadership, management, and operations. Section 309 of the District's policy manual provides that the assignment and transfer of employes in the District shall be determined by the management,

supervisory, instructional, and operational needs of the District. It further provides that the Superintendent may base assignment and transfer decisions on the administrative and operational efficiency of the proposed assignment. The Union stipulated and agreed that Section 301 is an active school board policy. (N.T. 37-38; Joint Exhibits 8 & 9)

23. Mr. Stankavage, in the position of "Administrator for Restorative Practices" does not evaluate, sanction or rate any employees. There are no duties on the new job description that require a certified administrator to perform. Mr. Stankavage has no authority to recommend hiring, transfers, or suspensions of other employees. He does not have the authority to recommend the assignment, discharge, or promotion of employees. (N.T. 93-95)

24. The District has not filed a petition for unit clarification with the Board to seek the reclassification of the ISSC position to the non-unit position of "Administrator for Restorative Practices." (N.T. 104)

25. The parties' collective bargaining agreement recognizes all full-time and regular part-time professional employees as follows:¹

kindergarten teachers, elementary classroom teachers, secondary classroom teachers, elementary special education classroom teachers, secondary special education teachers, reading teachers, librarians, elementary music, art and physical education teachers, certified nurses, elementary and secondary guidance counselors, other teachers involved in direct classroom instruction, school psychologists, and social worker and/or home and school visitor.

(Joint Exhibit 1)

DISCUSSION

As the District asserts, the operative facts in this case are largely not in dispute. (District Brief at 1). The Union argues that the transfer of any (i.e., even a de minimus amount) of identifiable bargaining unit work constitutes an unfair practice under Section 1201(a)(5) of PERA. The Union contends that the District unlawfully diverted bargaining unit work from the professional bargaining unit when it created the position of "Administrator for Restorative Practices" and gave the work of the ISSC to Mr. Stankavage, who the District transferred into the new position from the position of High School Principal. (Union Brief at 6-9). The Union further contends that the Board has held that, where an employer creates a position that falls within the broad unit description, the employer commits an unfair practice by unilaterally declaring that the position is excluded from the bargaining unit under the guise that the position meets one of the statutory exclusions under PERA. (Union Brief at 9-10).

The Union maintains that the District was required to treat the new position as a bargaining unit position because all the work was formerly performed by a bargaining unit professional, who performed instructional

¹ The Board's records indicate that the bargaining unit of professional employees represented by the Association is grandfathered under Section 602 of PERA. Accordingly, there is no Board order describing the bargaining unit, although there have been unit clarifications amending the unit.

duties in coordination with other teachers and counselors, without management or supervisory responsibilities. The bargaining unit description, which includes all teachers and counselors, does not distinguish between different types of teaching or counseling responsibilities; the description also does not distinguish between academic subjects. (Union Brief at 11). The Union further posits that even the newly created job description for the "Administrator for Restorative Practices" shows that the position does not meet the statutory definition of supervisor or manager. (Union Brief at 10-11). Additionally, the Union maintains that the record clearly shows that Mr. Stankavage does not actually perform any managerial or supervisory functions. Rather, Mr. Stankavage mostly performs the bargaining unit duties performed by the ISSC. The duties of the ISSC (and now the "Administrator for Restorative Practices") satisfy the definition of a professional teacher, who provides continuity of education and reflective counseling for suspended students. These duties, contends the Union, fall within the broad bargaining unit description that includes professional teachers and counselors at the District. (Union Brief at 10-11, 14-17).

In Allentown Education Association and Allentown Secretarial Educational Support Personnel Association v. Allentown City School District (Allentown), PERA-C-14-408-E, PERA-C-14-409-E, PERA-C-14-421-E (Final Order, 2018), the Board affirmed the hearing examiner and rejected the position taken by the District in this case.² In the Allentown case, the school district employer created 12-month, Act 93 administrative positions. The district transferred the duties of bargaining unit positions to the employees in those administrative positions, who were then performing the same duties as the bargaining unit employees formerly performed, with allegedly additional administrative duties. The Allentown City School District recognized that some of the duties of the new administrators were the same as the duties performed by the bargaining unit employees, but the district argued that those duties were now performed with managerial and supervisory authority. The Allentown Board stated that "the [d]istrict's arguments are of no moment outside the context of a unit clarification petition filed under Section 95.23 of the Board's Rules and Regulations. 34 Pa. Code §95.23."

The Allentown Board further emphasized the following:

[O]ver thirty years ago, the Commonwealth Court sitting *en banc*, fully endorsed the Board's policy that an employer commits an unfair practice by unilaterally redefining the bargaining unit through creation of positions or assignment of duties that remove positions or functions from the bargaining unit. Where an employer assigns alleged managerial, supervisory or confidential duties to a new or existing bargaining unit position, the employer may file a unit clarification petition for the Board to determine the inclusion or exclusion of the position in the bargaining unit, as it is the Board's continuing exclusive province under Section 604 of PERA to determine the appropriateness of the bargaining unit. City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987); Crestwood Educational Support Personnel Association v. Crestwood School District, 46 PPER 23 (Final Order, 2014). Simply stated, "[a] public employer may not, in an attempt to side-step an unfair practice charge, unilaterally redefine a bargaining unit by removing

² This decision is published on the Board's webpage under May 2018, Final Orders.

therefrom certain positions [or] functions performed by its members." City of Clairton, 528 A.2d at 1050. This fundamental tenet is firmly established in Board and appellate caselaw.

Allentown, supra, at 6-7. The Allentown Board further cited from its prior decision in Public Utility Commission, 20 PPER 20047 (Final Order, 1989), and quoted from the same, as follows:

We repeat our admonition of Commonwealth (Department of Commerce), [18 PPER ¶ 18018 (Proposed Decision and Order, 1986)], that a public employer which, under the guise of "reclassification," attempts to remove employes from a unit commits an unfair practice. See also Commonwealth of Pennsylvania, 9 PPER ¶ 9061 (Nisi Decision and Order, 1978), 9 PPER ¶ 9165 (Final Order, 1978). However, the [employer] may assign additional job duties to a position, reclassify the employes into a newly-created position, and thereafter petition the Board to remove the newly-created position out of the bargaining unit based upon the additional job duties.

Public Utility Commission, 20 PPER at 131.

Based on this consistent, long-standing authority, the Board, in Allentown, concluded as follows:

Accordingly, it is well settled that where any of the duties of the [new administrators] were previously performed by the bargaining unit employes, the District committed an unfair practice by unilaterally making such an assignment without having submitted the matter to the collective bargaining process or to the Board through a unit clarification proceeding. It is well-established that in the absence of an agreement with the Union or a unit clarification petition filed with the Board, the fact that any bargaining unit work is being performed by the [new administrators], who have been unilaterally deemed outside the bargaining unit by the District, is **per se** an unfair practice committed by the District. City of Clairton, supra, Public Utility Commission, supra, Elizabeth Township, supra, North Pocono School District, supra, Crestwood School District, supra.

Allentown, supra, at 8(emphasis original and added).

There is no dispute in this case that the District did not, at any time, file a petition for unit clarification with the Board to seek the removal of the position of "Administrator for Restorative Practices" from the professional bargaining unit. There is also no dispute that the District unilaterally diverted the duties of the ISSC to the "Administrator of Restorative Practices" and refused to bargain with the Union regarding the removal those duties. Additionally, the Union affirmatively sought bargaining with the District and was willing to permit the removal of the bargaining unit work for one full academic year, with an MOU. The record is also clear that Mr. Stankavage, as the "Administrator" in this case, performs the duties that Mr. Shivone performed when Mr. Shivone was the ISSC.

The record also establishes that Mr. Stankavage does not perform the requisite duties and responsibilities that would qualify his position for removal from the professional bargaining unit as either a manager or a supervisor, under PERA. The District argues that it has the inherent

managerial right to create new positions and change staff assignments under the Act and pursuant to District policies. (District Brief at 3-6). However, the Union does not challenge the District's general managerial right to create new administrative positions, transfer employees, or change work assignments. The Union challenges the District's removal of bargaining unit work to a newly created administrative position outside the unit, without bargaining or a unit clarification petition. Allentown supports the Union's position here and mandates that the District must either bargain with the Union or file a unit clarification petition with the Board. Only the Board has the authority, absent agreement from the Union, to evaluate whether the position is properly included or excluded from the bargaining unit, as a manager or supervisor under the Act. The public employer may not unilaterally evaluate the removal of work or the administrative status of a newly created position, unless the new position is a clearly recognized administrative position, such as the principal of an additional, new school building. Additionally, PERA overrides any District policies inconsistent with Act. Association of Clinton County Educators v. Keystone Central School District, 53 PPER 74 (PDO, 2022).

The District argues that promoting Mr. Shivone to the Dean of Students gave the District an opportunity to expand the ISS program where the new "Administrator for Restorative Practices" was a 12-month position working with the Assistant Superintendent for Student Services developing and coordinating equity and restorative disciplinary practices across the whole District. (District Brief at 7-8). These expanded duties, contends the District, required an administrator to plan and develop a District-wide program. (District Brief at 7-8). However, naming the new position "Administrator of Restorative Practices" did not make Mr. Stankavage an administrator while holding that position and neither does working with the Assistant Superintendent for Student Services in expanding the program. Calling Mr. Stankavage a supervisor because he oversees the in-school suspension program across the whole District, K-12 and all of its buildings, does not satisfy the criteria for supervisory employee under the Act. Indeed, any professional educator in the bargaining unit lacking supervisory or managerial authority can organize and operate a District-wide program in multiple buildings and assign coverage in the capacity of a lead worker or Department Chair.

The record lacks substantial evidence that Mr. Stankavage actually performs supervisory or managerial duties recognized under PERA. Mr. Stankavage coordinates with other professionals, as did Mr. Shivone; he does not supervise other District personnel, in the statutory sense. Although there is more emphasis on restorative and reflective practices, equity, and teaching youth court in lieu of formal discipline, those duties are not supervisory or managerial under the Act. Mr. Stankavage, as did Mr. Shivone, performs duties that are instructional, counseling oriented, and rehabilitative in nature. Those same duties are more properly performed by a bargaining unit professional such as a counselor or a teacher, not a manager or supervisor.

The school-board-approved job description for the position of "Administrator for Restorative Practices" contains a list of duties. The first of these listed duties provides: "Supervise and effectively run the Middle School In-School Suspension (ISS) Program." The second of the listed responsibilities provides: "Develop and implement a plan to expand ISS and Restorative Practices to all grade levels while integrating Restorative Practices into existing initiatives (i.e. PBIS, MTSS)." There is no evidence

that a bargaining unit professional would not be able to develop the existing ISS program, to accomplish these goals, at the Middle School or across the District, or that supervisory/managerial authority is necessary.

Mr. Stankavage, as the "Administrator for Restorative Practices," does not effectively recommend the hiring, transferring, discharging, promoting, evaluating, rating, or sanctioning of any District employes. In this regard, the term "supervise" as used in the school-board approved job description simply means "oversee," and the position does not qualify for a statutory exclusion. Moreover, Mr. Shivone, as a bargaining unit member, developed the initial ISS program and coordinated with other professionals to effectuate the program. The record does not establish that Mr. Stankavage effectively developed or implemented policy changes on a managerial level outside the technical expertise of a teaching professional coordinating and facilitating the operation of the ISS Program.

The record also establishes that the duties of the new position belong in the bargaining unit. A bargaining unit member proposed creating the position of ISSC in the Middle School. The school board approved the creation of the position and awarded it to a bargaining unit professional, Mr. Shivone. When Mr. Shivone began as the ISSC, he resigned from his position as a 7th grade social studies teacher, and the District hired a new bargaining unit teacher to fill his vacancy in social studies. The record further demonstrates that Mr. Shivone, as the ISSC, was in the bargaining unit; he was being paid according to the parties' CBA; he had access to the grievance procedure and other contractually negotiated benefits; and he worked the same schedule as other professionals in the bargaining unit.

The District maintains that the definition of professional under the School Code should apply and that the scope of professional work should be determined thereunder. The District contends that the ISSC work was supplemental work that does not meet the School Code definition of professional bargaining unit work and that the ISSC is not delineated in the parties' CBA. (District Brief at 16). The District posits that the definition for professional under PERA should not apply to the work here because this matter is not a unit clarification. (District Brief at 16). In this regard, the District maintains that under Harbor Creek School District v. PLRB, 631 A.2d 1069 (Pa. Cmwlth. 1993), the ISSC work was supplemental under the School Code, and it did not belong to the professional bargaining unit. Therefore, the District contends that the work was not unlawfully transferred to administrator Stankavage. (District Brief at 15-16).

Initially, the District, indeed, should have pursued the unit clarification process if the District genuinely wanted to convert the ISSC position to an administrative position. Additionally, the School Code definition of professional employe includes both teachers and administrators. Mr. Shivone, while he was the ISSC, was a professional full-time teacher in the bargaining unit acting in the capacity of an educator, instructor, and counselor; he was not an athletic director or some other position not listed as professional in the School Code. The work of the ISSC was not supplemental to teaching; rather it directly involved professional teaching and counseling through mentoring and reflection as well as ensuring that academic work and lessons were completed properly by answering academic questions and aiding students in completing school work performed during ISS. The work of the ISSC was the work of bargaining unit professionals covered by the CBA and under the definitions of "professional" under both the School Code and PERA. Indeed, Mr. Shivone developed the ISSC position as one to be held by an

educator, not an administrator, and the record shows that the duties of Mr. Stankavage continued to involve instruction, coordinating, and counseling without supervisory or managerial responsibilities. (Joint Exhibit 10).

Moreover, the Board has concluded that the definition of professional employe in the School Code is not binding on the Board's determination of professional employe status under PERA and that a lack of PDE certification is not dispositive of the determination of professional status of the position under consideration. In the Matter of the Employes of Erie City School District, 33 PPER 33089.(Final Order, 2002). Although the District's position is that the PERA definition should not apply because of the posture of this case, everything this Board addresses is under PERA, and this Board does not have the expertise or the jurisdiction to apply a different statute that may or may not be conflict with PERA.

In Harbor Creek, the Commonwealth Court held as follows:

We disagree with the PLRB's position that the district's actions constituted the removal of bargaining unit work without bargaining because we do not believe the prior duties of the athletic director constituted bargaining unit work. Regardless of the fact that the cases cited by the district involved grievance arbitration and not unfair labor practices, the cases stand for the proposition that supplemental activities by professional employees which do not fall within the definition of professional employee in the Code are not covered by a collective bargaining agreement relating to professional employees. We have a prior holding in this matter in *Harbor Creek I* that the prior athletic director position was a supplemental position not covered by the collective bargaining agreement. Because the duties of athletic director were not covered by the collective bargaining agreement, they cannot be bargaining unit work. The district therefore did not transfer bargaining unit work out of the bargaining unit and the district was under no obligation to bargain before taking the action it took.

Harbor Creek, 631 A.2d at 1072. The crux of the Court's Harbor Creek decision was that the duties of the athletic director in that case were not covered by the collective bargaining agreement governing the terms and conditions of the professional employes. The Harbor Creek Court also concluded that, although the athletic director was also a teacher in the bargaining unit, he was not acting in a professional full-time teaching capacity when he was performing the duties of athletic director. Accordingly, the Court concluded that his athletic director work was not bargaining unit work.

Unlike Harbor Creek, Mr. Shivone, as the ISSC, was a teacher in the professional bargaining unit performing full-time professional teaching duties covered by the School Code, unlike the athletic director in Harbor Creek whose supplemental duties were not covered by the School Code or the professional bargaining unit CBA. Moreover, the record shows that, as the full-time ISSC, Mr. Shivone was definitely covered by the terms and conditions of employment of the professional CBA. Accordingly, the ISSC work was professional bargaining unit work and Harbor Creek is inapplicable.

As the ISSC, Mr. Shivone was not a supervisor or a manager, and he performed the duties of the ISSC as a bargaining unit member for 2 years. The District recognized that the ISSC was a bargaining unit position and awarded the position to another bargaining unit member, Steve Chase, when the

District promoted Mr. Shivone to an existing administrative position of Dean of Students. The District allegedly contemplated that the position would acquire administrative duties and responsibilities related to the expansion and development of the existing ISS Program. However, the duties currently performed by Mr. Stankavage, on this record, do not satisfy the statutory criteria for management or supervisory level employee. Even if the duties did satisfy the statutory criteria for exclusion, the District committed a **per se** unfair practice by not bargaining the removal of the work or filing a unit clarification petition to have the Board determine the proper placement of the new position.

The District contends that supervising students assigned to in-school suspension was not exclusively performed by the bargaining unit because, prior to the creation of the ISSC position, both teachers and administrators shared those duties. (District Brief at 2, 10-11). However, the record does not contain substantial, competent evidence that any administrators performed the duties of the ISSC in the Middle School for the 2 years that Mr. Shivone held the position. To the extent that administrators may have monitored Saturday detention prior the creation of the ISSC position or during Mr. Shivone's tenure as the Middle School ISSC, the record does not establish that administrators covered Saturday detention at the High School. Also, Mr. Shivone's proposal for the ISSC position criticizes Saturday detention as ineffective because students do not show up for them.

Moreover, Saturday suspensions were limited to the High School and did not affect the identifiable and quantifiable bargaining unit work of Mr. Shivone at the Middle School. Furthermore, there is no evidence that Saturday detention involved the learning, teaching, instruction, counseling, or rehabilitative work performed by Mr. Shivone as the Middle School ISSC. On this record, Saturday detention could have been just a big timeout for High School students in trouble, without the educational experience of ISS at the Middle School.

The Shivone proposal stated, in relevant part, that "[l]unch detentions, afterschool detentions, and Saturday school detentions are never attended, and hours continue to pile up. These actions effectively render the discipline system obsolete and there is no change in behavior for an entire segment of students." (F.F. 4; Joint Exhibit 10). Moreover, Mr. Shivone's proposal also stated that the behavior of ISS students "would have an immediate consequence while also benefitting from high quality instruction from a Chichester School District educator." (Joint Exhibit 10) (emphasis added). The District's position is that Mr. Stankavage is both an educator and administrator. But the administrative duties have not been established on this record, and Mr. Shivone's program was more sophisticated and educational, both academically and emotionally, than detention.

Under Allentown, the District committed a **per se** unfair practice pursuant to Section 1201(a) (5) of PERA, when it unilaterally diverted the identifiable bargaining unit work of the ISSC at the Middle School to the "Administrator for Restorative Practices," without bargaining with the Union or filing a unit clarification petition. The District attempted to remove work from the professional bargaining unit, under the guise of reclassification, to a non-unit position without giving the newly created administrative position the actual statutory authority to qualify for removal and without filing a unit clarification petition for Board approved removal.

Under present circumstances, the position of "Administrator for Restorative Practices" is not ripe for removal under the Boards unit clarification procedures. Should the District seek the removal of the position of "Administrator for Restorative Practices" in the future, by filing a unit clarification petition with the Board, it will have to demonstrate changed circumstances. The name or characterization of the position does not determine whether a position should be excluded from the bargaining unit. Also, the number of months or days worked by the employe in the position does not establish a statutory exclusion. Of course, the District may always negotiate some resolution with the Union.

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 within the meaning of Section 301(1) of PERA.
2. The Chichester Education Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has committed unfair practices within the meaning of Section 1201(a)(5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Examiner

HEREBY ORDERS AND DIRECTS

That the District shall:

1. Cease and desist from refusing to bargain collectively in good faith with the Chichester Education Association which is the exclusive collective bargaining representative of professional employes of the District, including but not limited to discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:

(a) Immediately return all bargaining unit work performed by the "Administrator for Restorative Practices" to the professional bargaining unit represented by the Chichester Education Association by having a bargaining unit member perform those duties, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the District's unfair practices;

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place, readily accessible to its

employees, and have the same remain so posted for a period of ten (10) consecutive days;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Chichester Education Association.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this first day of September, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

S/ JACK E. MARINO

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CHICHESTER EDUCATION ASSOCIATION :
PSEA/NEA :
v. : CASE NO. PERA-C-21-279-E
CHICHESTER SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

The Chichester School District hereby certifies that it has ceased and desisted from refusing to bargain collectively in good faith with the Chichester Education Association, in violation of Section 1201(a)(5) of the Public Employe Relations Act; that it has immediately returned all bargaining unit work performed by the "Administrator for Restorative Practices" to the professional bargaining unit represented by the Chichester Education Association by having a bargaining unit member perform those duties; that it has restored the status quo ante, and made whole any bargaining unit employes who have been adversely affected due to the District's unfair practices; that it has posted a copy of this Decision and Order as directed therein; and that it has served a copy of this Affidavit of Compliance upon the Chichester Education Association.

Signature/Date

Title

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

Signature of Notary Public