

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PLEASANT VALLEY EDUCATION SUPPORT :
PROFESSIONALS ASSOCIATION, PSEA/NEA :
 :
v. : Case No. PERA-C-22-322-E
 :
PLEASANT VALLEY SCHOOL DISTRICT :

FINAL ORDER

The Pleasant Valley School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 28, 2023, challenging a Proposed Decision and Order (PDO) issued on December 8, 2023. In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA), by directly dealing with several bargaining unit employes and unilaterally altering the hourly pay rates of those employes in a manner inconsistent with the parties' collective bargaining agreement (CBA). Pursuant to an extension of time granted by the Secretary, the District filed a supporting brief on January 18, 2024. The Pleasant Valley Education Support Personnel Association, PSEA/NEA (Union) filed a response and brief in opposition to the exceptions on February 6, 2024.

The relevant facts of this case are summarized as follows. The parties are signatories to a CBA which provides, in Article I, as follows:

The [School] Board hereby recognizes the Association as the exclusive representative for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment in accordance with the provisions of Act 195 and Act 88 of 1992, for personnel employed by the [School] Board as regular **custodians, maintenance technicians, secretaries, bookkeepers, couriers, paraprofessional associates (PPA), food service employees, monitors, information systems technicians (IS Tech), student information data specialists (SIDS), and health room technicians (HRT)** and excluding management level employes, supervisors, first level supervisors, confidential employes, and guards as defined by the Act.

(FF 5) (emphasis in original).¹ The CBA also provided salary schedules governing hourly wage rates for nonprofessional employes during each year of the contract. (FF 6). Further, Article VI of the CBA provided for full hospitalization, health and dental insurance for all full-time bargaining unit employes. (FF 7).

¹ The Union and the District are parties to a CBA that covers the time-period of July 1, 2021, to June 30, 2026. (FF 12). The previous CBA covered the time-period of July 1, 2018, to June 30, 2021. (FF 4).

In Article VII, Section 20 of the CBA, the parties agreed, in pertinent part, that "[w]hen additional monitors and paraprofessionals beyond those regularly employed are needed, the School District shall offer such work to bargaining unit School District employees first before offering the work to a substitute." (FF 11). The District maintained Policy 305 regarding "Employment of Substitutes and Short-Term Employees" since 2016. This Policy provides, in pertinent part, as follows:

Qualified and competent substitutes for professional and support employees shall be employed by the [D]istrict in order to provide continuity in the educational programs, operations and services of the schools...

* * * *

Substitutes for support employees shall be compensated at a rate set annually by the [School] Board for the various classes of employees.

(FF 15).

The District maintains and operates a computer system and portal called AESOP that lists open positions, and reports which employees are assigned to those positions. When an employee is covering for an absent employee, AESOP will list the names of the absent employee and the other employee who is covering the position. If the "substitute" is not covering for an absent employee, AESOP will list only the name of the person filling the position and classify the position as "open" or "vacant." (FF 20).

Kimberly Tinker began working for the District as a paraprofessional in September of 2018, but was furloughed in June of 2020. From October 4, 2022 until April 20, 2023, Ms. Tinker worked 110 days for the District as a paraprofessional in the same assignment. The AESOP records kept by the District show that Ms. Tinker filled a vacant position with no other employee assigned thereto, and she worked full-time hours every day. (FF 21). The District did not treat Ms. Tinker as a bargaining unit employee. Rather it classified her as a substitute and paid her the substitute rate of \$82.50 per day instead of the contractual salary and benefits for a paraprofessional. (FF 22). During her assignment from October 4, 2022, to April 20, 2023, the District never posted the position in which Ms. Tinker was working. (FF 23).

Kelly Chiumento began working for the District as a paraprofessional in October 2013, and was furloughed twice, once in June of 2020, and then again in June of 2022. (FF 24). Ms. Chiumento returned to the District as a paraprofessional on September 8, 2022 and was assigned to work in a kindergarten classroom in the District. She worked full-time hours from September 8, 2022 to October 6, 2022. The AESOP records kept by the District indicate that Ms. Chiumento was working in a vacant position to which no other employee was assigned. (FF 25). The District did not treat Ms. Chiumento as a bargaining unit employee for this period but instead classified her as a substitute. Accordingly, the District did not pay her the contractual salary for a paraprofessional, but instead paid the substitute

rate of \$82.50 per day. Further, the District did not provide benefits to Ms. Chiumento for this time period. (FF 26).²

Joanne Mastronardi began working for the District as a part-time secretary in 2009, and was furloughed as of July of that year. She then returned to work for the District in September of 2009 as a monitor. Ms. Mastronardi was furloughed from that position as of June of 2022. (FF 30). She then returned to work for the District as a secretary in July of 2022. The AESOP records show that when she initially returned to the District, she covered for several other secretaries who were out on leave. (FF 31). On August 1, 2022, the District transferred one of the other secretaries (Shirley Hood) to a different building and Ms. Mastronardi was assigned via AESOP to the secretarial position previously held by Ms. Hood. (FF 32).

The District's AESOP records indicate that Ms. Mastronardi was the only employe assigned to that position which was "vacant" from August 1, 2022, until September 23, 2022. During that time-period, Ms. Mastronardi worked full-time hours. (FF 32). The District did not treat Ms. Mastronardi as a bargaining unit employe for that time period, but classified her as a substitute. Thus, she was not paid the contractual salary for a secretary, nor provided with benefits. Instead, Ms. Mastronardi was paid the substitute rate of \$82.50 per day. (FF 34). After September 23, 2022, Ms. Mastronardi became a full-time bargaining unit secretary, and received the contractual pay and benefits associated with the position. (FF 35).

Jessica Borger began working for the District as a monitor at the middle school in September of 2017, and resigned that position in March of 2021. She then returned to the District in September of 2022 as a monitor in the high school and worked every day from September 6, 2022, to January 20, 2023, for three to four hours per day.³ The District's AESOP records indicate that Ms. Borger was the only employe assigned to that position, which was listed as open. (FF 37). The District did not treat Ms. Borger as a bargaining unit employe during this time-period, but instead, classified her as a substitute and paid her the substitute rate of \$9.15 per hour, rather than the contractual rate of \$11.24 per hour. (FF 38).

Nikki Haden-Coar began working for the District as a monitor in 2019, and was furloughed in June of 2022. (FF 40). Ms. Haden-Coar came back to the District in the Fall of 2022 to work as a monitor in the elementary school. She worked 3.75 hours per day, on frequent days, from October 5, 2022, until May 24, 2023. The District's AESOP records show that Ms. Haden-Coar was the

² Ms. Chiumento testified that she was contacted by the Elementary Principal, Roger Pomposello, on September 7, 2022, concerning the assignment and that she was next on the furlough list. (FF 28). The District's Assistant Business Manager, Tammy Smale, and the District's Human Resources Director, Lori Fulmer, both testified that Ms. Chiumento was recalled from the furlough list and assigned to the Kindergarten classroom. (FF 29). After October 6, 2022, the District treated Ms. Chiumento as a bargaining unit employe. (FF 27).

³ Ms. Borger testified that the District posted for the monitor position as a permanent position several times during the 2022-2023 school year while she was working in the position. The District offered the position to Ms. Borger some time in December 2022 or January 2023, but she declined the position. (FF 39).

only employe assigned to an open position for this period, except for 3 days when she filled in for other bargaining unit employes who were absent. (FF 41). The District did not treat Ms. Haden-Coar as a bargaining unit employe for the period of October 5, 2022, to May 24, 2023, but rather, classified her as a substitute. The District paid Ms. Haden-Coar the lower substitute rate of \$9.15 an hour, as opposed to the contractual rate of \$11.24 per hour. (FF 42).

Joan Mattson began working for the District as a monitor in 2020, and was furloughed in June of 2022. (FF 43). She returned to work at the District as a secretary for the 2022-2023 school year, typically working 3.25 hours per day on frequent days from November 1, 2022, through March 16, 2023. The District's AESOP records indicate that she was the only employe assigned to a vacant position for that time-period. (FF 44). The District did not treat Ms. Mattson as a bargaining unit employe for the period of November 1, 2022, to March 16, 2023, but classified her as a substitute. As such, she was not paid at the contractual hourly rate but the lower substitute rate of \$11.47 an hour. (FF 46).

Drita Beskovich began working for the District as a paraprofessional in 2014, and was furloughed in June of 2020. (FF 47). Ms. Beskovich came back to the District as a paraprofessional in the Fall of 2022, and worked full-time hours on frequent days from October 11, 2022 to December 21, 2022. AESOP records show that Ms. Beskovich was the only employe assigned to an open position for this time-period. (FF 48). The District did not treat Ms. Beskovich as a bargaining unit employe but classified her as a substitute. Thus, the District did not pay her the contractual salary, nor benefits, but rather, paid Ms. Beskovich the substitute rate of \$82.50 per day. (FF 49).

The Union never agreed to allow the District to pay these seven individuals wage rates which were outside the CBA, nor deprive them of benefits. (FF 51). Tammy VanHouwe has been employed by the District for approximately 20 years. She initially started as a monitor but has been a paraprofessional since 2006. She is currently serving as President of the Union since June 1, 2022, and previously held the position of Vice President for 2 years and Membership Chair for one year. (FF 16).

Ms. VanHouwe testified that in the years prior to June 2022, the District used non-bargaining unit substitute employes only to fill in for other employes who were out on leave and expected to return to work. Further, she explained that the District never used non-bargaining unit substitutes to fill vacant or newly created positions that did not have an employe assigned to them. Additionally, Ms. VanHouwe explained that in unforeseen or emergency situations, such as when a new special education student transferred into the District, bargaining unit members would work together to "absorb" the work created by the new scenario. (FF 17). Finally, Ms. VanHouwe testified that in June of 2020, the District furloughed 52 part-time paraprofessional employes, and that in June of 2022, the District laid off 11 monitors, 20 paraprofessional and three secretaries. (FF 18). Ms. VanHouwe had multiple discussions prior to December of 2022 with the District's Superintendent, Assistant Superintendent, and Business Manager objecting to the District classifying these individuals as long-term substitutes. The Business Manager acknowledges that Ms. VanHouwe had repeatedly requested the District to recall employes and fill open positions. (FF 54 and 55).

The Union filed a Charge of Unfair Practices with the Board on December 8, 2022, as amended on May 3, 2023, alleging that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally changing the hourly wage rate for several bargaining unit employees to rates which are inconsistent with those set forth in the CBA, and failing to provide those employees with the benefits to which they were contractually entitled. Further, the Charge alleged that in so doing, the District violated PERA by engaging in direct dealing and repudiating the terms and conditions of the CBA.

On March 2, 2023, the Secretary issued a Complaint and Notice of Hearing, assigning this matter to a Hearing Examiner. After several continuances requested by the parties, the hearing was held before the Hearing Examiner on July 17, 2023, 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 by dealing directly with the employees and paying them wages which were less than the wages listed in the CBA for the work they performed. In this regard, the Hearing Examiner stated, as follows:

In this case, the [Union] has sustained its burden of proving that the District violated the Act by bypassing the exclusive bargaining representative and unilaterally decreasing the pay and/or benefits for the seven bargaining unit employees at issue in the fall of 2022, without bargaining with the [Union]. For example, the record shows that Kimberly Tinker worked full-time for 110 days as a paraprofessional performing bargaining unit work from October 4, 2022 to April 20, 2023. However, the District did not treat Tinker as a bargaining unit employee and classified her as a "substitute" instead. Thus, the District did not pay Tinker the contractual salary and benefits she was entitled to pursuant to the CBA. Likewise, the record supports the same conclusion for Kathy Chiumento, who worked full-time as a paraprofessional from September 8, 2022 to October 6, 2022. In fact, the same result obtains for all five remaining employees at issue... However, the District admittedly failed to provide all of these employees with the contractual pay and/or benefits they were entitled to under the CBA. Rather, the District deemed these employees "substitutes" and paid them a substitute rate of pay, which the District unilaterally set in December of 2019. This was a clear refusal to bargain and plain evidence of direct dealing in violation of the Act.

(PDO at 10-12). Further, the Hearing Examiner held that the Union sustained its burden of proving that the District violated PERA by repudiating the pay, benefits, and recall provisions of the CBA.

Initially, the District claims that the charge filed by the Union in this matter is untimely because "[t]he Association knew or should have known that the District was utilizing substitutes since at least 2012 when the Board of School Directors publicly approved the substitute rates." (District's Brief at 27). However, the Union is not challenging the District's use of substitutes in general, but rather, the District's improper labeling of certain employees as "substitutes" to avoid paying regular bargaining unit pay for bargaining unit work. This alleged misclassification

began in the fall of 2022, and the Union's charge, filed on December 8, 2022, was within the four-month statute of limitations set forth in Section 1505 of PERA. As such, the charge was timely, and the District's argument to the contrary is without merit.

On exceptions, the District makes several arguments in support of its claim that the Hearing Examiner's decision was erroneous. Initially, the District asserts that the Hearing Examiner erred in failing to credit the testimony of its witnesses that the employes at issue were substitutes filling in for bargaining unit employes on leave. It is the Hearing Examiner's function 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). Absent the most compelling of circumstances, the Board defers to the credibility determinations of its hearing examiners who observe the manner and demeanor of the witnesses during the testimony. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Id.; International Association of Firefighters Local 840 v. Larksville Borough, 48 PPER 82 (Final Order, 2017). Here, the Hearing Examiner credited the testimony of Union President VanHouwe that the District's practice of using substitutes was limited to situations where an employe was out of work on leave and would be returning to the position rather than to fill a vacant or newly created position to which no other employe was assigned. Further, the AESOP system printouts put into evidence clearly reflect that no one was assigned to various positions which the substitutes were working despite the claim of District witnesses to the contrary. The Board finds that the Hearing Examiner's findings on the parties' practice concerning utilization of substitutes is supported by the record, and the District has failed to present any compelling reasons to overturn the Hearing Examiner's credibility determinations.

At the heart of the District's exceptions is its argument that the Hearing Examiner improperly included the substitute positions held by Kimberly Tinker, Kelly Chiumento, Joanne Mastronardi, Jessica Borger, Nikki Haden-Coar, Joanne Matson, and Drita Beskovich into the non-professional bargaining unit in violation of School Board Policy 305 which permits the use of substitutes when necessary "to provide continuity in educational programs, operations and services of the schools." (District's Brief at 10). In particular, the District asserts that because it did not "schedule" the seven employes for work in the District, but merely advised them via the AESOP portal that bargaining unit work was available, those employes were "substitutes" who were not entitled to bargaining unit wages and benefits. (District's Brief at 14). This argument is devoid of merit because the Hearing Examiner concluded that the vacant paraprofessional positions filled by the seven employes fell within the language of the certified bargaining unit, and not that temporary substitutes were included in the unit.

Additionally, although the District's Policy 305 contemplated that substitutes would, from time to time, be necessary to fill in gaps when a bargaining unit employe needed to miss work, the unequivocal testimony at hearing revealed that none of the seven employes here at issue were ever used by the District as a temporary replacement for an absent bargaining unit employe. Rather, each of the seven employes testified that they worked full-time hours consistently over extended periods of time in an open bargaining unit position, and that they were not temporarily covering for anyone.

Furthermore, the employes testified that they did so without receiving the bargaining unit wages and benefits associated with that position. As such, the Union clearly established that these seven employes were not "substitutes" as that term has been traditionally understood by the parties.

The District further alleges that the Hearing Examiner erred in finding that it engaged in direct dealing with these seven employes because it did not directly negotiate with them concerning the substitute positions on AESOP. Section 701 of PERA requires public employers to bargain in good faith with the employes' exclusive bargaining representative "with respect to wages, hours and other terms and condition of employment..." 43 P.S. §1101.701. "[T]he role of the collective bargaining agent as the sole representative of all employes would be undermined if the school district could unilaterally bargain to give individual employees [different] benefits than those negotiated for employees who bargained collectively." Millcreek Township School District v. PLRB, 631 A.2d 734, 738 (Pa. Cmwlth. 1993). An employer violates its duty to bargain where it bypasses the exclusive employe representative and negotiates directly with an employe. Temple Association of University Professionals, AFT Local 4531 v. Temple University, 38 PPER 156 (Final Order, 2007). However, "[a]n exchange of proposals is not required to conclude that an employer has violated [PERA] in bypassing the exclusive bargaining representative and dealing directly with employes." York City Employees' Union v. City of York, 38 PPER 80 at 220 (Final Order, 2007). Rather, all that is necessary to sustain a direct dealing charge is that the public employer, acting unilaterally, altered an employe's rate of pay, and the employe accepted it. East Stroudsburg Area Education Support Personnel Association v. East Stroudsburg Area School District, 54 PPER 65 (Proposed Decision and Order, 2023).

The record shows that the District furloughed a large amount of monitors and paraprofessionals, and then, rather than recall furloughed employes to bargaining unit positions for the next school year, it simply placed those positions on the "substitute" list and gave the furloughed employes the choice of working in that capacity making substantially less money without benefits, or not working at all. Indeed, the testimony of Union President VanHouwe confirmed that this had never been the case prior to the 2022-2023 school year because whenever there was a vacancy in the past, the bargaining unit members would all pitch in to "absorb" the work until the position was filled. (N.T. 158-159). Therefore, it is clear that the District classified these seven employes as "substitutes" in a veiled attempt to improperly circumvent the provisions of the CBA in order to cut costs. Thus, the evidence unquestionably establishes direct dealing. The fact that this was accomplished by utilizing a computer portal without direct discussions or negotiations between the District and the individual employes is of no moment. See City of York, supra.; Clarion Limestone Educational Support Personnel Association, ESPA/PSEA/NEA v. Clarion Limestone School District, 35 PPER 76 (Final Order, 2004); East Stroudsburg Area School District, supra. ⁴

⁴ The District suggests that the holding in East Stroudsburg should not be followed because it was issued by the same hearing examiner who decided this case. Not only has the District failed to proffer any citation to legal authority supporting this argument, but we note the Board strives for consistency which was achieved in this case by citing to a recent decision which rested on sound legal authority.

Finally, the District's exceptions must fail because its position is belied by the CBA itself. In Article VI, Section 20 thereof, the parties specifically agreed that "when additional monitors and paraprofessionals beyond those regularly employed are needed, the School District shall offer such work to bargaining unit employees before offering the work to a substitute." (FF 11). That simply was not done in the instant matter. Instead, the District hired these seven employees as "substitutes" and paid them rates inconsistent with the CBA and did not afford them any benefits. Therefore, the Hearing Examiner properly found that the District repudiated the terms and conditions of the contract, and thereby engaged in bad faith bargaining in violation of Section 1201(a)(1) and (5) of PERA.⁵

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Hearing Examiner properly concluded that the District violated Section 1201(a)(1) and (5) of PERA when it engaged in direct dealing and repudiated the terms and conditions contained in the parties' CBA by unilaterally altering the wages of the seven employees at issue to a rate which was inconsistent therewith. Accordingly, the Board shall dismiss the District's 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 the Pleasant Valley School District are dismissed, and the December 8, 2023, 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, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member, this eighteenth day of June, 2024. 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.

⁵ The District claims the Hearing Examiner improperly considered the Union's allegation that the District repudiated the CBA's furlough and recall provisions even though it was not raised specifically in the unfair practice charge. However, this argument fails. The District was clearly on notice of the scope of the charge, as evidenced by the fact that the Union raised the CBA's recall provisions at the hearing and the District's witnesses testified about the issue, and were cross-examined by the District thereon. This is all that is required under the liberal pleading requirement applied to administrative proceedings. See Youngwood Borough Police Department, 17 PPER 17039 (Order Directing Remand, 1986). Moreover, the unfair practice under Section 1201(a)(1) and (5) of PERA for direct dealing and repudiation of the contractual wage and benefit provisions of the CBA stands independently from any alleged repudiation of the furlough and recall provisions of the CBA.

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AFFIDAVIT OF COMPLIANCE

Pleasant Valley School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it has complied with the Final Order and Proposed Decision and Order as directed therein by immediately tendering full backpay for lost wages and/or benefits to include out of pocket medical expenses and pension contributions, retroactive to the first respective day of employment, less any 10-day agreement to the contrary, along with six percent per annum interest, to Kimberly Tinker, Kelly Chiumento, Joanne Mastronardi, Jessica Borger, Nikki Haden-Coar, Joan Mattson, and Drita Beskovich for the periods set forth above during the 2022-2023 school year; that it has posted a copy of the Final Order and Proposed Decision and Order in the manner prescribed therein; and that it has served a 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

Signature of Notary Public