

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :  
 : Case No. PERA-U-08-266-E  
 : (PERA-R-02-499-E)  
BRANDYWINE HEIGHTS AREA SCHOOL DISTRICT :

**FINAL ORDER**

On April 28, 2010, the Brandywine Heights Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Order of Unit Clarification (POUC) issued on April 9, 2010. In the POUC, the Board's Hearing Examiner granted the Petition for Unit Clarification filed by the Brandywine Heights Educational Support Personnel Association, PSEA/NEA (Association) and determined that the payroll position held by Kathy Hassler is properly included in the nonprofessional bargaining unit. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

8. District Business Manager Steven Fischer makes recommendations to the District's negotiating committee in collective bargaining with the District's professional and nonprofessional bargaining units and sits at the bargaining table during negotiations. Ms. Hassler has assisted Mr. Fischer in negotiations by costing out bargaining proposals. (N.T. 25, 27, 29-32, 45-46, 50-53, 60).

DISCUSSION

The facts of this case are summarized as follows: The District Superintendent, Dr. Handler, and the District Business Manager, Steven Fischer, each have a confidential secretary who is excluded from the bargaining unit. Kathy Hassler, whose payroll position was excluded from the bargaining unit as confidential by agreement of the parties when the unit was certified in 2003, has worked for the District for twenty-two years. Her job duties include working with other secretarial employees; maintaining payroll records; distributing, receiving and verifying employment information and entering it into the District's system; verifying time card totals; maintaining payroll deductions and budget payroll distribution records; preparing tax forms; processing paychecks; maintaining District records for audits; assisting employees with insurance questions; answering telephones and assisting in the sorting of mail. Ms. Hassler has similar job functions, works a similar schedule, and is paid similarly to bargaining unit members.

Mr. Fischer makes recommendations to the District's negotiating committee in collective bargaining with the District's professional and nonprofessional bargaining units and sits at the bargaining table during negotiations. Ms. Hassler has assisted Mr. Fischer in negotiations by costing out bargaining proposals.

In the POUC, the Hearing Examiner concluded that Ms. Hassler's position is not confidential under Section 301(13) of the Public Employee Relations Act (PERA).<sup>1</sup> In its exceptions, the District contends that the Hearing Examiner erred by, *inter alia*, failing to include in Ms. Hassler's job duties her participation in the collective bargaining process. The District argues that because Ms. Hassler works closely with Business Manager Fischer in formulating District bargaining proposals and costing out proposals, Ms. Hassler is a confidential employe under PERA.

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<sup>1</sup> Section 301(13) of PERA defines "confidential employe" as follows:

"'Confidential employe' shall mean any employe who works (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer."

The District first challenges the Hearing Examiner's failure to credit Ms. Hassler's testimony regarding her involvement with the collective bargaining process. The Hearing Examiner adequately explained his reasons for discrediting Ms. Hassler's testimony that she made recommendations for District bargaining proposals. (POUC at 3-4). Absent compelling circumstances, the Board will not reverse the credibility determinations of its hearing examiners, who are able to observe the manner and demeanor of the witnesses during their testimony. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004); Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). We find no compelling reasons to reverse the Hearing Examiner's credibility determination in this case concerning Ms. Hassler's role in the bargaining process.

Although the Hearing Examiner rejected the District's claim that Ms. Hassler has input in formulation of District bargaining proposals, the Hearing Examiner also credited the District's testimony that Ms. Hassler's duties have included costing out bargaining proposals for Mr. Fischer. (POUC at 3, 5-6). However, the Hearing Examiner stated that costing out bargaining proposals is not confidential work. *Id.* The Hearing Examiner further stated that even if such duties are confidential, the Business Manager already has a confidential secretary and the District failed to prove that it needs an additional confidential employe to perform such tasks.

In reaching this result, the Hearing Examiner relied on Trinity Area School District, 22 PPER ¶ 22125 (Final Order, 1991), in which the Board held that the fact that an employe costed out a range of bargaining proposals did not demonstrate confidential status where there was no evidence that the employe became privy to the employer's collective bargaining strategy. However, Trinity Area School District was decided before the Commonwealth Court's decision in North Hills School District v. Pennsylvania Labor Relations Board, 762 A.2d 1153 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 566 Pa. 653, 781 A.2d 150 (2001). In North Hills, which the Hearing Examiner failed to address, the Commonwealth Court reversed the Board and held that an employe may be deemed confidential under Section 301(13) without evidence that the employe became privy to the employer's collective bargaining strategy. The issue in North Hills was whether a secretary (Dougherty) to an Assistant Superintendent (Santillo) was a confidential employe under the second prong of Section 301(13) of the Act. In concluding that Dougherty was a confidential employe, the Commonwealth Court stated as follows:

... PERA defines **two** distinct categories of confidential employees. Section 301(13)(ii) of the PERA, which applies here, defines a confidential employee in broad terms as "any employe who works ... in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer." 43 P.S. § 1101.301(13)(ii) (emphasis added). Here, Santillo is a member of the School District's negotiation team, sits at the bargaining table during negotiations and has assumed an intense role in negotiations with the teacher's union, custodians and the Act 93 employes. (See PLRB's Findings of Fact, No. 17; R.R. at 78a.) Thus, Santillo indisputably qualifies as a "representative associated with collective bargaining" on behalf of the School District. Further, as Santillo's only secretary, Dougherty clearly has a close continuing relationship with Santillo and, thus, appears to have fully satisfied the PERA's **second** definition of a confidential employee. ...

... [S]ection 301(13)(ii) of the PERA does not even mention the content of the information accessible to the employee; rather, in that second category of confidential employee, the focus is upon the level of association that the public officer or representative has with the employer's collective bargaining process. As interpreted by the PLRB, the exclusion under section 301(13)(ii) is limited to employees who work in a close continual relationship with "managerial personnel who actually participate in the collective bargaining in [sic] behalf of the public employer," Altoona Area School District, 480 Pa. at 155, 389 A.2d

at 557, in other words, those who actually formulate, determine or effectuate the employer's labor policy. Id.

Where an employee has a close relationship with such involved management personnel, the PERA appears to assume that that employee would have access to confidential information, so that their "inclusion in the bargaining unit would seriously impair the public employer's ability to bargain on a fair and equal footing with the union." Id. at 155, 389 A.2d at 557.

Id. at 1158-1159 (emphasis in original; footnote omitted). Thus, the Commonwealth Court in North Hills effectively overruled cases such as Trinity Area School District and held that an employe is confidential under the second prong of Section 301(13) of PERA if the employe works in a close continuing relationship with an employer representative associated with collective bargaining, regardless of whether the employe becomes privy to the employer's collective bargaining strategy.

In Westmont Hilltop School District, 33 PPER ¶ 33067 (Final Order, 2002), a Secretary/Payroll Clerk (Ms. Cramer) provided information to a member of the district's bargaining team (Business Manager Gregory Sanford) for use in analyzing bargaining proposals. In concluding that the Secretary/Payroll Clerk was confidential, the Board stated:

[T]he hearing examiner concluded that the secretary/payroll clerk worked in a close continuing relationship with the Business Manager and therefore was excluded as confidential within the meaning of section 301(13)(ii). In doing so, the hearing examiner cited North Hills School District ... In that case, the Commonwealth Court construed Section 301(13)(ii) of PERA to exclude an employe as confidential as long as that employe works in a close continuing relationship with an employer representative associated with collective bargaining.

...

The Association ... contends that the hearing examiner erred in concluding that the secretary/payroll clerk works in a close continuing relationship with the Business Manager. The Association argues that the only thing close and continuing about the relationship between Ms. Cramer and Mr. Sanford is that their work areas are in close proximity to each other. However, Ms. Cramer not only works in close proximity to Mr. Sanford, but also is involved with Mr. Sanford's collective bargaining responsibilities on behalf of the Employer. Such job duties are indicative of the type of close and continuing relationship directly related to collective bargaining that would justify a confidential exclusion ... The secretary/payroll clerk's duty with respect to the preparation of spreadsheets used in the Employer's proposals is just the type of job duty that substantiates a close continuing relationship.

33 PPER at 140. The Hearing Examiner here clearly erred in relying on Trinity Area School District and failing to follow the Commonwealth Court's binding precedent in North Hills and the Board's decision in Westmont Hilltop.

Recently, in Neshannock Township School District, 41 PPER 83 (Final Order, 2010), petition for review filed, No. 1657 C.D. 2010 (August 13, 2010), which was decided after the Hearing Examiner's decision in this case, the Board reaffirmed its Westmont Hilltop decision. The issue in that case was whether the accounts payable clerk (Ms. Arrow) was a confidential employe. The Board, relying on North Hills, stated that:

...[U]nder the Commonwealth Court's decision in North Hills, supra, an employe may be deemed confidential under the second prong of Section 301(13) of PERA without evidence that the employe became privy to the employer's collective bargaining strategy.

...

...[W]hile Ms. Arrow may report directly to the Business Manager, who is not involved in collective bargaining, she also provides vital information to District bargaining representatives that is utilized in analyzing bargaining proposals. Ms. Arrow's performance of these job duties is sufficient to establish a close continuing relationship for purposes of Section 301(13)(ii) of PERA. Westmont Hilltop School District, 33 PPER ¶ 33067 (Final Order, 2002).

Id. at 284.

Mr. Fischer, as the District's Business Manager, makes recommendations to the District's negotiating committee in collective bargaining with the District's professional and nonprofessional bargaining units and sits at the bargaining table during negotiations. Thus, he is a representative "associated with collective bargaining on behalf of the employer" under Section 301(13)(ii) of PERA. Necessarily, the next question is whether Ms. Hassler works in a close continuing relationship with Mr. Fischer. The un rebutted testimony of Mr. Fischer was that Ms. Hassler costed out bargaining proposals for negotiations. Although the Hearing Examiner discounted much of Ms. Hassler's testimony regarding her role in the bargaining process, he did find that her role in bargaining involved the costing out of District bargaining proposals. The performance of such duties indicates that Ms. Hassler has worked in a close continuing relationship with Mr. Fischer. In Neshannock and Westmont Hilltop, the Board found that employees who provided similar information for use in the bargaining process were confidential employees. Consistent with those decisions, and with the Commonwealth Court's decision in the North Hills case, the Board finds that Ms. Hassler qualifies as a confidential employee under Section 301(13)(ii) of PERA.

The District also challenges the Hearing Examiner's conclusion that the District failed to show that it "needs" Ms. Hassler as an additional confidential employee. Although the Hearing Examiner is correct that employers are not permitted to scatter confidential duties among employees in order to obtain more confidential exclusions than necessary to conduct bargaining, Cheltenham School District, 32 PPER ¶ 32098 (Final Order 2001), there is no evidence that the District has done so in this case. In Westmont Hilltop, the Board addressed a similar argument and found that the facts did not show that the school district was impermissibly scattering confidential duties to obtain exclusions. The Board based this conclusion on the fact that the school district assigned job duties consistent with the different functions performed by the confidential secretary and secretary/payroll clerk. The Board further noted that a different conclusion would result if, for example, the business manager assigned the confidential secretary and the secretary/payroll clerk to each type a portion of proposals that were being prepared for negotiations.<sup>2</sup> Here, there is no evidence of such scattering of duties. Even though Mr. Fischer has a confidential secretary who is excluded from the bargaining unit, it is not unusual or suspect that he uses Ms. Hassler, who oversees payroll, to cost out District bargaining proposals because she is the one who has access to and is familiar with the information needed to make the necessary calculations that assist the District in formulating its bargaining proposals. Because Ms. Hassler's duties here indicate that she does, indeed, work in a close continuing relationship with Mr. Fischer and that the District is not impermissibly scattering confidential duties among employees to achieve unnecessary or unwarranted exclusions from the bargaining unit, it is appropriate to continue to exclude Ms. Hassler from the bargaining unit as a confidential employee.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the District's exceptions and vacate the conclusion in the POU that the payroll position held by Kathy Hassler is not confidential within the meaning of Section 301(13) of PERA.

#### CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Order of Unit Clarification are affirmed and incorporated herein by reference.

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<sup>2</sup> In Westmont Hilltop, the Board cited the following cases as examples of the impermissible scattering of confidential duties: West Jefferson Hills School District, 25 PPER 25137 (Final Order, 1994) (employee who provided secretarial services to the business manager was not confidential where another employee provided the same services to the business manager); Commodore Perry School District, 3 PPER 35 (Order and Notice of Election, 1973) (same); Blackhawk School District, 4 PPER 76 (Nisi Decision and Order, 1974) (three of five secretaries in a secretarial pool found not to be confidential despite the fact that any pool employee may be assigned confidential work).

CONCLUSION 4 is vacated and set aside.

5. The payroll position held by Kathy Hassler is confidential within the meaning of Section 301(13)(ii) of PERA.

**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 District are hereby sustained, that the Order on page 6 of the Proposed Order of Unit Clarification is vacated and set aside, and that the Petition for Unit Clarification filed by the Association is dismissed.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twenty-first day of December, 2010. 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.