

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-R-11-352-E
 :
 AGORA CYBER CHARTER SCHOOL :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On October 19, 2011, the Agora Employees Education Association, PSEA/NEA (Union) filed with the Pennsylvania Labor Relations Board (Board) a petition for representation pursuant to the Public Employe Relations Act (PERA) alleging that thirty per cent or more of the professional and nonprofessional employes of the Agora Cyber Charter School (School or Agora) wish to be exclusively represented by the Union for the purpose of collective bargaining. On October 27, 2011, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on Thursday, November 17, 2011, in Harrisburg. I granted the School's request for a continuance and rescheduled the hearing for November 21, 2011. At the hearing on that day, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The School is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).
3. The parties stipulated and agreed that the professional and nonprofessional employes of the School share an identifiable community of interest within the meaning of Section 604(1)(i) of PERA. (N.T. 4-5).
4. The parties stipulated and agreed that the position of Data Analyst is a managerial position within the meaning of Section 301(16) of PERA and is properly excluded from the proposed bargaining unit. (N.T. 5).
5. The parties stipulated and agreed that the following positions are professional positions that share an identifiable community of interest and that are properly included in the proposed bargaining unit: Teacher, Certified School Nurse, Math Specialist, Reading Specialist, Advisor, Guidance Counselor, Speech Pathologist, Social Worker, Academic Coach, Classroom Coach, Related Services Coordinator, Special Education Psychology Coordinator, Family Teacher Coach and Medical Assistant. (N.T. 5-8).
6. The parties stipulated and agreed that the following positions are nonprofessional positions that share an identifiable community of interest and that are properly included in the proposed bargaining unit: Receptionist, Special Project Assistant, Records Coordinator, Special Education Records Assistant. (N.T. 5-8).
7. The parties stipulated and agreed that the position of Instructional Coach is professional. The parties stipulated and agreed to a mail ballot election. (N.T. 6-7).
8. In mid-June 2011, the School identified the position of Instructional Coach and hired 8 people to fill those positions. (N.T. 13-14, 22).

9. Instructional Coaches visit cyber classrooms daily and observe teacher performance. They support and collaborate with teachers to improve teacher instruction and performance. (N.T. 17-18, 82, 136).

10. Teachers are not required to work with an Instructional Coach; the teacher invites a coach into his or her classroom for assistance. The job description for the Instructional Coach provides that the position is non-supervisory. (N.T. 33, 136).

11. The job description for the Instructional Coach also provides, in relevant part, as follows:

The central idea behind instructional coaching is equality. Coaches and teachers are equal partners. The role of a coach is separate and apart from the evaluative role of the academic administrator. The coach advocates for, facilitates, and supports the work of the teacher but never performs supervision or evaluation.

(Union Exhibit 1).

12. The job description for the Instructional Coach further identifies some of the relevant responsibilities of the Instructional Coach position and provides that Instructional Coaches shall:

Work with teachers to make decisions about where to start coaching, focusing on engagement, content knowledge, direct instruction, and formative assessment.

Provide feedback that is specific and direct.

Review data as partners, using dialogue[.]

Coaching will include, but not be limited to, observing, modeling of instructional practices, lesson planning to differentiate instruction, data analysis, and co-planning with teachers[.]

(Union Exhibit 1).

13. Instructional Coaches maintain records on forms of their teacher interactions. These forms guide the teacher-coach relationship, identify areas of concern and guide the coaching. The forms are maintained by the Instructional Coach, and teachers' names are confidential. (N.T. 137-139; School Exhibits 1-4).

14. Teachers may waive their confidentiality. Instructional Coaches sometimes meet with teachers in the (cyber) presence of the high school director (i.e., principal), who also observes teacher performance for evaluation purposes. Participating teachers sometimes review their administrative evaluations with their coaches to better understand those evaluations. (N.T. 84, 140-141).

15. Coaches are not permitted to make policy changes or supervise teachers; they are equal partners with teachers. (N.T. 45, 142-143, 145-146; Union Exhibit 1).

16. Instructional Coach John McMurray relayed teachers' concerns regarding the interaction between teachers and co-teachers (i.e. special education teachers) to remediate troubled students. The co-teaching model at the School existed before the position of Instructional Coach. Last year, each regular education class had a special education teacher attached to the class. This year, after Mr. McMurray reported teacher concerns, the special education teacher now also works with the regular education teacher and not just with the students. (N.T. 146, 154).

17. Melissa Hoffman-Long is a science teacher who has proposed policy changes and recommendations to her director (principal). Ms. Long proposed changing the grading procedure of giving fifty percent for incomplete assignments. She also suggested changing

teacher schedules to provide more flexibility for phone calls and small group remediation. (N.T. 152-153).

18. The position of Response to Instruction and Intervention (RTII) Coordinator is mandated by law through a program that assesses student performance through benchmarks. Under this program, students are placed on tiers based on their academic performance and the level of educational services they require. (N.T. 34).

19. A Local Education Agency Representative (LEA) represents the School during Individualized Education Program (IEP) meetings. The LEA presides over the meetings and ensures that the IEP is fair and appropriate for the student and that the School's resources are properly utilized for the student. The LEA is not involved in preparing the IEP. (N.T. 36-41, 112).

20. The RTII Coordinator may serve as the LEA during an IEP meeting. Maegan Bregenser, and RTII Coordinator, served as an LEA this year. (N.T. 37, 112).

21. Agora utilizes a three-tier system. Students are placed on either tier 1, 2 or 3 based on testing, screening and assessment results. Agora uses a universal screening test called "Scantron" for all incoming students. The School also relies on PSSA scores. If the original data from Scantron and PSSA scores show that a student is at-risk, Agora utilizes other screening tools, such as Study Island or the A+ Learning Link System, to further test the accuracy of the original assessment. The RTII Coordinator has no involvement in the selection of screening tools. (N.T. 102-103, 111).

22. The actual tools that are used to measure students' needs and remedy student deficiencies (i.e., A+, Study Island, Scantron etc.) are imposed on the RTII Coordinators by Agora. Last year, a screening tool change for grades kindergarten through sixth over to "Aims Web" was made by Agora leadership, and not RTII Coordinators. (N.T. 118-119).

23. Tier 1 is benchmark. All students are assumed to be able to perform at a proficient level and to be able to make adequate progress based on manual instructions at Tier 1. (N.T. 103-104; School Exhibit 7).

24. Teachers determine whether students are not making adequate progress. If a student needs more help to perform at a proficient level, the teacher moves the student to Tier 2 and provides additional instruction to the student. If additional instruction beyond Tier 2 is required, the student is moved to Tier 3 and a specialist may be assigned or additional testing may be required. (N.T. 103-104).

25. The baseline information for the three-tier framework was adopted from the Commonwealth and the National RTII Center. The framework is a standard that is accepted and utilized across the country. At the beginning of the 2011-2012 school year, RTII Coordinators, Ms. Dieter and Ms. Bregenser, collaborated with administrators on a new framework for RTII Coordinators, necessitated by position changes at Agora. Everyone expressed ideas. Some of Ms. Dieter's and Ms. Bregenser's ideas were dismissed. (N.T. 117-118, 123-126).

26. Teachers ask RTII Coordinators for ideas to remediate poor student performance. Teachers and RTII Coordinators discuss which tools, made available by Agora, to employ to help students. (N.T. 105-107).

27. RTII Coordinators organize team meetings with the teacher, nurse psychologist, social worker and parents to discuss a child's needs and to recommend options for the child's improvement. The School psychologist determines whether additional testing is necessary. A guidance counselor or School nurse may decide whether testing for a medical condition is necessary. The social worker determines whether a child is being influenced by any social or family factors. Each professional makes a decision based on their specialty. (N.T. 108-109).

28. At a meeting with administrators, the A+ Learning Link System was introduced. Ms. Bregenser and RTII Coordinator, Shannon Dieter, proposed a way to incorporate A+ into the tier framework. The adoption of A+ and the elimination of Compass Learning Odyssey were not decided by any RTII Coordinators. (N.T. 115-117).

DISCUSSION

The School contends that the positions of Instructional Coach and RTII Coordinator are management level positions and therefore should be excluded from the proposed bargaining unit. (N.T. 8; School's Post-hearing Brief at 2-16).

A "'Management level employe' means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision." 43 P.S. § 1101.301(16). In applying this definition, the Board has held that:

[T]his provision establishes a disjunctive three-part test and that an employe who satisfies any of the following three criteria is a manager: (1) either the employe is directly involved in the determination of policy; (2) the employe directly implements policy; or (3) the employe is above the first level of supervision.

In the Matter of the Employes of Allgheny-Clairion Valley School District, 41 PPER 21 (Final Order, 2010); See also, In the Matter of the Employes of Lower Providence Township, 16 PPER ¶ 16117 (Final Order, 1985).

In Horsham Township, 9 PPER ¶ 157 (Final Order, 1978), the Board interpreted the policy formulation part of the test of management level status as follows:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

Horsham Township, 9 PPER at 327 (emphasis added).

The Horsham Township Board also explained the meaning of "responsibly directs" the implementation of policy, under the second part of the test for management level status, as "those persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task." Horsham Township, 9 PPER at 327.

1. Credibility

As an initial matter, I credit the testimony of the Union's witnesses (who actually serve in the positions of the Instructional Coach and RTII Coordinator) to determine the actual job duties and responsibilities of those positions. The candor, frankness and manner of testifying of RTII Coordinators Maegan Bregenser and Shannon Dieter and Instructional Coach John McMurray revealed an uncoached, in-depth familiarity with their

positions and the associated daily job duties and responsibilities. I credited the testimony of School Administrators for the limited purpose of uncontested, general background information. I relied solely on the testimony of Ms. Bregenser, Ms. Dieter and Mr. McMurray for evidence of job duties and responsibilities of the positions of RTII Coordinator and Instructional Coach respectively. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994)(holding that the hearing examiner determines a witness's credibility based on appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor and frankness during direct and cross-examination); Keystone Education Center Charter School Education Association v. Keystone Education Center, Inc., 30 PPER ¶ 30167 (Final Order, 1999) (opining that the hearing examiner is free to accept or reject the testimony of any witness, in whole or in part, based on the witness's credibility).

2. Instructional Coach

In its post-hearing brief, the Union maintains that the position of Instructional Coach is a non-managerial professional position that must remain in the unit. (Union's Post-hearing Brief at 1-2). An Instructional Coach, argues the Union, "works directly with teachers in assisting them in improving their performance. Coaches and teachers are equal partners." (Union's Post-hearing Brief at 2). The Union contends that the coaches do not formulate or implement managerial policies and they do not perform any evaluative or supervisory role to teachers. The Union further analogizes this case with the recent decision of the Board in In the Matter of the Employees of Abington Heights School District, 42 PPER 18 (Final Order, 2011), and argues that any policies developed by the coaches involved their professional discretion and technical expertise rather than managerial discretion. I agree with the Union that Abington Heights, supra, is controlling here. Moreover, the facts, as found herein, do not support the conclusion that the Instructional Coaches exercise managerial discretion in the area of policy formulation or implementation within the meaning of Abington Heights.¹

The substantial, credible evidence of record shows that coaches do not have a managerial role at Agora. They collaborate with teachers in the same manner as other School professionals in the proposed bargaining unit. The collaboration between teachers and coaches is no different than the collaboration between teachers, specialists, psychologists, the nurse, family coaches and others in attempting to identify and remediate student performance issues.

In Abington Heights, the Board quoted from its decision in Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988), wherein it adopted National Board authority and drew a distinction between employees who develop policies in the fulfillment of their professional responsibilities and those who exercise discretion in formulating policies on behalf of management. Abington Heights, supra. As recited in Abington Heights, the Penn State Board noted that "the NLRB has held that judgments of professional employees which transcend the technical discipline of professionals should be distinguished from those instances where the natural and normal performance of professional duties may affect the employer's policy merely by the specialized nature of the professional's normal tasks." Abington Heights, 42 PPER at 54-55 (quoting Penn State, 19 PPER at 378 (citing General Dynamics Corp., 1013 NLRB 851 (1974))). Adopting the National Board's decision in Montefiore Hospital and Medical Center, 110 LRRM 1048 (1982), this Board noted that "***[o]nly if the activities of professional employees fall outside the scope of the duties routinely performed by similarly situated professionals will they be found aligned with management.*** Penn State, 19 PPER at 378 (quoting Montefiore Hospital, 110 LRRM at 1050)(emphasis added by Board in Penn State).

The School emphasizes that the high school coaches developed forms to establish a policy for assessing and coaching teachers. These forms, however, merely track the mandates of the coaches' job description, which requires the coaches to dissect the

¹ The School does not posit that the Instructional Coaches are managers because they are above the first level of supervision.

identifiable aspects of instruction and review the teacher's performance under those topics. In other words, the forms identify instructional areas such as student engagement, direct instruction and planning and curriculum and formative assessment. The job description similarly requires coaches to make decisions about engagement, direct instruction, content knowledge and formative assessment. The forms, therefore, copy what the administration has already implemented in the job criteria for the coaches.

The fact that coaches may have developed forms to organize their coaching efforts and log the issues discussed for coaching is a matter of professional expertise and organizational skill, not managerial policy formulation. Indeed, the forms are part of the coaches' record keeping system that any and all professionals maintain in the performance of their job duties.

Instructional Coach John McMurray credibly testified that coaches are not permitted to make policy changes or supervise teachers; they are equal partners with teachers. The credible evidence of record shows that the grading and co-teacher policies were not developed or implemented by any of the Instructional Coaches. Coach McMurray relayed teacher concerns about Agora's grading policy to the high school director. Teachers wanted written guidelines for grading. Also, Coach McMurray relayed teachers' concerns regarding the interaction between teachers and co-teachers (i.e. special education teachers) to remediate troubled students. He did not formulate or initiate the proposed changes he relayed to the administration. The co-teaching model at the School existed before the position of Instructional Coach. Last year, each regular education class had a special education teacher attached to the class. This year, after Mr. McMurray reported teacher concerns, the Agora Leadership implemented the policy of having special education teachers now also work with the regular education teacher and not just with the special education students.

The transmittal or proposal of changes in protocols by coaches to improve professional life for the educators at Agora are no different than the policy changes proposed by teachers and other professionals. Melissa Hoffman-Long is a science teacher who has proposed policy changes and recommendations to her director (principal). Ms. Long proposed changing the grading procedure for incomplete assignments. She also suggested changing teacher schedules to provide more flexibility for professional phone calls and small group remediation. These teacher-initiated policy proposals to improve student achievement and teacher performance did not qualify her as a manager anymore than the proposals relayed by Mr. McMurray transformed him into a manager.

Accordingly, the record shows that the Instructional Coaches do not regularly participate in the decision making process in formulating managerial policies. At best, they develop vehicles for improving teacher performance and education at Agora as a function of the natural and normal performance of their professional duties, much like a teacher. None of the activities or ideas identified by the School as policy formulation or implementation fall outside the scope of the Instructional Coaches professional responsibilities.

3. RTII Coordinator

The credible evidence of record demonstrates that the position of RTII Coordinator is not a managerial position and should remain in the proposed bargaining unit. The RTII Coordinator is a resource for assessing student performance and matching the appropriate educational tools for remediating poor academic achievement. The RTII Coordinator position is mandated by law to assess student performance through benchmarks. Under this approach, students are placed on tiers based on their academic performance and the level of educational services they require. Agora utilizes a three-tier system. Students are placed on either tier 1, 2 or 3 based on testing, screening and assessment results.

The three-tier framework was adopted by Agora from Pennsylvania and national standards, which are accepted and utilized across the country. At the beginning of the

2011-2012 school year, RTII Coordinators, Ms. Dieter and Ms. Bregenser, collaborated with administrators on an amended framework for RTII Coordinators. Some of Ms. Dieter's and Ms. Bregenser's ideas were dismissed.

Agora screens all incoming students for placement using certain assessment tools. The RTII Coordinator has no involvement in the selection of any of these screening tools. Although there was evidence that RTII Coordinators proposed a way to incorporate the A+ Learning Link System into the tier framework, the adoption of A+ and the elimination of Compass Learning Odyssey were not decided by any RTII Coordinators and their idea was no different than teachers recommending program changes. The actual tools that are used to measure students' needs and remedy student deficiencies (i.e., A+, Study Island, and Scantron) are imposed on the RTII Coordinators by Agora. Last year, a screening tool change for grades kindergarten through sixth over to "Aims Web" was made by Agora leadership and not RTII Coordinators.

RTII Coordinators and teachers enjoy a similar collaborative professional relationship as the teachers and coaches. Teachers determine whether students are making adequate progress and whether to move the student to Tier 2 for additional instruction. If additional instruction beyond that is required, the student is moved to Tier 3 and a specialist may be assigned or additional testing may be required. Teachers then ask RTII Coordinators for ideas to remediate poor student performance. Teachers and RTII Coordinators discuss which tools to employ to help students.

At this point, RTII Coordinators organize team meetings with the teacher, nurse psychologist, social worker and parents to discuss a child's needs and to recommend options for the child's improvement. The School psychologist determines whether additional testing is necessary. A guidance counselor or School nurse may decide whether testing for a medical condition is necessary. The social worker determines whether a child is being influenced by any social or family factors. Each professional makes a decision based on their specialty. However, the RTII Coordinator is but one professional on a team of professionals using her technical expertise to contribute to the development of a productive educational protocol for a deficient student, as part of the overall education of the student.

Accordingly, RTII Coordinators are necessary and valuable experts in remedial education with heightened technical expertise in identifying and eliminating deficiencies in student progress. In this regard, the RTII Coordinator is similar to the School nurse, a bargaining unit position also mandated by law, who identifies medical or physical deficiencies in students and attempts to remediate those physical issues within certain prescribed limitations. RTII Coordinators exercise professional and technical discretion in developing educational protocols and remedies for students every day, within the meaning of Abington Heights, *supra*. However, they do not exercise the type of management level discretion in policy formulation or implementation necessary to satisfy the elements of Section 301(16) of PERA.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Agora Cyber Charter School is a public employer within the meaning of section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.

4. The employees in the proposed bargaining unit of professional and nonprofessional employees at the Agora Cyber Charter School share an identifiable community of interest.

5. The position of Instructional Coach is not a management level position and is properly included in the bargaining unit of professional and nonprofessional employees at Agora.

6. The position of Response to Instruction and Intervention Coordinator is not a management level position and is properly included in the bargaining unit of professional and nonprofessional employees at Agora.

7. The position of Data Analyst is a management level position and is properly excluded from the bargaining unit of professional and nonprofessional employees at Agora.

8. The unit appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time professional and nonprofessional employees including but not limited to Teachers, Certified School Nurses, Math Specialists, Reading Specialists, Advisors, Guidance Counselors, Speech Pathologists, Social Workers, Academic Coaches, Classroom Coaches, Related Services Coordinators, Special Education Psychology Coordinators, Family Teacher Coaches, Medical Assistants, Receptionists, Special Project Assistants, Records Coordinators and Special Education Records Assistants; and excluding Data Analysts and other management level employees, first-level supervisors, confidential employees and guards as defined in the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Agora Cyber Charter School shall within ten days of the date hereof submit to the Board and the other parties an alphabetized list of the names and addresses of the employees eligible for inclusion in the unit set forth above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b) following the conduct of an election.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this twenty-eighth day of March, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner