

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PERA-U-11-268-E
: (PERA-R-82-67-E)
BENSALEM TOWNSHIP SCHOOL DISTRICT :

PROPOSED ORDER OF DISMISSAL

On August 15, 2011, AFSCME District Council 88 (Union) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employe Relations Act (PERA) seeking to include the position of route data analyst/dispatcher (Route DAD) in the bargaining unit of white collar nonprofessional employes at the Bensalem Township School District (District). On August 30, 2011, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on Monday, January 30, 2012, in Harrisburg. During the hearing on that date, the District and the Union were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties timely 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 District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 3; PERA-R-82-67-E).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 3; PERA-R-82-67-E).
3. Melissa Kennedy is the Route DAD for transportation and has been since the position was created in 2003. (N.T. 57-58, 91, 107).
4. The District is responsible for the safe transportation of 5,200 District students plus an additional 2000 students attending charter schools, the intermediate unit and other non-public schools. The bus routing determinations are complex and time consuming and depend on information retrieved from all schools served by the District's transportation department. (N.T. 59).
5. Ms. Kennedy is the contact person if there is a lost child. She coordinates efforts with the appropriate school principal and the bus drivers as well as central District administrators to find the lost child. (N.T. 62-63, 79).
6. Ms. Kennedy authorizes non-routine responses to bus emergencies. She directs the use of additional buses on routes where the assigned bus experiences overcrowding or mechanical failure, without obtaining permission. Ms. Kennedy frequently dispatches replacement buses for mechanical failures and bus accidents. (N.T. 65-67, 79).

7. Ms. Kennedy frequently changes bus routes throughout the year due to frequent student residency changes in the District where 40% of the students reside in rental housing. Ms. Kennedy receives information for new and moved students. She assigns a safe bus stop for those students and then notifies the parents and the bus driver of the new student and bus stop. (N.T. 71, 146).

8. Ms Kennedy determines whether to contact police or central District administrators regarding student incidents on buses. (N.T. 114-118).

9. Ms. Kennedy has approved District transportation for students whose walking route would be hazardous even though the student does not qualify for bus transportation under the District's distance policies. Ms. Kennedy also provides non-qualifying students with bus transportation when they provide appropriate medical justification from a physician. (N.T. 150-151).

DISCUSSION

The District challenges the petition and claims that the Route DAD is a managerial, or alternatively, a supervisory level position. At the hearing, the District refused to stipulate that, if I concluded that the position was neither managerial nor supervisory, Ms. Kennedy shared an identifiable community of interest with the other employes in the bargaining unit. Accordingly, the Union had the initial burden of establishing the community of interest, as required by Section 604(1)(i) of PERA. 43 P.S. § 1101.604(1)(i); Amalgamated Transit Union Local 89 v. PLRB, 493 A.2d 485 (Pa. Cmwlth. 1985).

Immediately following the Union's case for community of interest, the District moved for non-suit arguing that the Union failed to establish community of interest. (N.T. 46). At the time, I deferred my ruling on the District's motion. In In the Matter of the Employes of Riverview Intermediate Unit #6, 37 PPER 106 (Final Order, 2006), the Board opined as follows:

The Board has long held that representation proceedings, like the unit clarification petition here, are investigatory, not adversarial, in nature and that strict burdens of proof do not apply, but that a petition seeking to change the status quo has the burden of persuasion to prove the averments in the petition. . . . The Association thereafter relied upon its cross examination of the Employer's witnesses to further buttress its case that an identifiable community of interest exists between the petitioned-for employes and the employes in the existing bargaining unit. . . . Since this proceeding is investigatory and not adversarial in nature, the hearing examiner correctly refused to dismiss the Association's petition for its alleged failure to carry its burden of proof and further correctly relied upon the testimony that was included in the Employer's case that supports . . . the conclusion that an identifiable community of interest exists in this case.

Riverview, 37 PPER at 360.

The Board clearly explained in Riverview that hearing examiners are not authorized to dismiss petitions for unit clarification based solely on the petitioner's case. In unit clarification proceedings, the Board is authorized to conduct its own investigation into the appropriateness of the unit. Therefore, the parties are not formalistically held to strict burdens of proof. Due to the investigatory nature of the proceedings, a hearing examiner must consider the respondents evidence and any evidence adduced and investigated by the hearing examiner, on behalf of the Board. The Board's hearing examiners are authorized to independently examine witnesses and documents in unit determination cases. 34 Pa Code § 95.91(g-h). Accordingly, the Board, having directly addressed this issue in Riverview, requires that I dismiss the District's motion for non-suit and evaluate the entire case to determine whether Ms. Kennedy shares an identifiable community of interest with the other employes in the bargaining unit.

As the party seeking to exclude the Route DAD position from the unit, the District must demonstrate that the position is either managerial or supervisory. In the Matter of the Employes of State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999). Under Section 301(16) of PERA, a management level employe is defined as follows:

[A]ny 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). The Board has held that this 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 Lower Providence Township, 16 PPER ¶ 16117 (Final Order, 1985). The Commonwealth Court has held that an employer is a manager if he or she, at times, performs managerial functions and that the employe does not lose his or her managerial status simply because "their actions are subject to review by other individuals superior to them in management." In the Matter of the Employees of Carlynton School District v. Carlynton School District, 377 A.2d 1033, 1035 (Pa. Cmwlth. 1977).

In this case, the District claims that Ms. Kennedy, as the Route DAD, at times implements District policy under the second criteria. In Horsham Township, 9 PPER ¶ 157 (Final Order, 1978), the Board explained the meaning of the term: "responsibly directs" the implementation of policy, 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.

The District's transportation department is charged with the daily, safe transportation of over 7000 school children. The logistics of developing safe and efficient bus routes and stops for children attending, not only District schools, but also a multitude of non-District private schools, public charter schools and the Intermediate Unit, assigning drivers

and students to routes, assigning substitute drivers for drivers who call off work, assigning replacement buses and drivers for mechanical failures and other emergencies, tracking fuel consumption and billing, as well as providing buses for extra-curricular and special education student transportation is an extremely complex and daunting operation, the success of which is owed in large part to the talents and hard work of Ms. Kennedy.

The record demonstrates that Ms. Kennedy exercises discretion in determining when to suspend and override District transportation policies to fulfill the District's overarching mission to ensure safe transportation. In this regard, Ms. Kennedy has provided students with access to the District's transportation system (when they normally would not qualify for busing under the District's policies) when those children would have to walk along routes deemed hazardous by Ms. Kennedy. Ms. Kennedy has also provided District transportation to otherwise non-qualifying children when those children's physician supplied medical justification deemed qualifying by Ms. Kennedy.

Also, Ms. Kennedy exercises managerial discretion by configuring and developing complex bus routes and bus stops to ensure safety and cost-effectiveness. The District has care, custody and control of the children on District buses and is responsible for student safety. Ms. Kennedy fulfills those responsibilities for the District by initiating and coordinating emergency responses to reports of missing or injured children. In this capacity, she also determines which District personnel to recruit to effectively manage those occurrences. Ms. Kennedy further exercises managerial discretion by determining which incidents of student misbehavior to report to District administration or the police. In this manner, Ms. Kennedy implements the District's policies to ensure safe, disciplined travel on District buses. Accordingly, the District has demonstrated that the position of Route DAD is a managerial level position is properly excluded from the bargaining unit of white collar nonprofessional employes at the District.¹

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 Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The position of Route Data Analyst/Dispatcher, currently held by Melissa Kennedy, is a management level position and is thereby properly excluded from the bargaining unit of white collar, nonprofessional employes at the District.

¹ Based on this conclusion, it is unnecessary to address the Union's community of interest claim or the District's claim of supervisory status.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the petition for unit clarification is dismissed.

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 be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of April, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner