

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

SAUCON VALLEY EDUCATION ASSOCIATION :  
:  
v. : Case No. PERA-C-00-380-E  
:  
SAUCON VALLEY SCHOOL DISTRICT :

**FINAL ORDER**

On July 16, 2001 the Saucon Valley School District (District) filed with the Pennsylvania Labor Relations Board (Board) an exception and a supporting brief to a Proposed Decision and Order (PDO) issued June 29, 2001. In the PDO, the Hearing Examiner concluded that the newly-created position of Director of Psychological Services (Director) was not supervisory and therefore was appropriately included in the professional collective bargaining unit represented by the Saucon Valley Education Association (Association). The Examiner further concluded that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by negotiating terms and conditions of employment directly with the Director that are inconsistent with the applicable collective bargaining agreement (CBA).

The facts as found by the Hearing Examiner are as follows. For several years prior to the 2000-2001 school year, the District employed Dr. Henry Gursky as its only full-time psychologist. Dr. Gursky's position was a professional position within the collective bargaining unit. During this time, the District also contracted with the Colonial Intermediate Unit No. 20 (IU) for the services of a part-time psychologist. For the 1999-2000 school year, the part-time position was held by Michelle Gillespie. In the summer of 2000, Dr. Gursky terminated his employment with the District and Ms. Gillespie interviewed for the vacant psychologist position. Had she been hired to fill that position, Ms. Gillespie's salary would have been between \$30,000 - \$40,000 according to the salary schedule in the parties' CBA. The District contacted the Association about hiring Ms. Gillespie to fill the vacant full-time psychologist position at a salary exceeding the appropriate step for a bargaining unit member with her years of experience. Upon learning that the Association would object to such a hiring, the District opted not to fill the vacant position and to instead create the new Director of Psychological Services (Director) position. Ms. Gillespie was hired to fill the Director position for the 2000-2001 school year at a salary of \$45,000 and the District continued to contract with the IU for a part-time psychologist. The vacant full-time psychologist position has not been filled.

In its exception, the District asserts that it did not violate its bargaining obligations because the Director position is a supervisory position that is excluded from the professional collective bargaining unit. The District criticizes the Hearing Examiner for failing to "properly assess [1] the context in which the position of Director of Psychological Services was created, [2] the primary functions of that position and [3] the supervisory duties of that position." (District, Br. at 5.)

First, the alleged "context" in which the Director position was created does not support the District's action. Without citing to the notes of

testimony adduced at the hearing, the District refers to "uncontradicted evidence" in its brief regarding its reexamination of the duties and responsibilities of the psychologist position, in combination with its annual review of the goals and objectives of the District to improve the supervision and coordination of the special education department. (District, Br. at 7.) The District argues that the Hearing Examiner erred by not incorporating this context into his findings of fact. Neither the Board nor its hearing examiners are required to make findings summarizing all of the evidence presented. Page's Dep't Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). Rather, an examiner need only make those findings that are both relevant to the decision and necessary to resolve the issues presented. AFSCME, Council 13 v. Office of Attorney General, 30 PPER ¶ 30214 (Final Order, 1999); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order 1997); PSSU Local 668, SEIU v. Dep't of Public Welfare (Allegheny County Assistance Office), 27 PPER ¶ 27188 (Final Order, 1996). The essential issue presented to the Hearing Examiner was whether the District engaged in unlawful direct dealing with a member of the Association's professional collective bargaining unit, or whether the Director position was excluded from the unit by virtue of its supervisory status. The Hearing Examiner did not err by failing to incorporate this background information into his findings of fact. The context in which the Director position was created is not relevant to the Board's analysis of whether it is supervisory, because the Board's inquiry is limited to the actual functions of the job. Washington Township Municipal Authority v. PLRB, 569 A.2d 402, appeal denied, 525 Pa. 652, 581 A.2d 577 (1990)(statutory exclusions from bargaining units must be based upon actual job duties).

Second, the District asserts that "the Hearing Examiner ignored the specific job functions that were to be performed by the Director . . . ." (District, Br. at 8.)(emphasis added). The Hearing Examiner incorporated the Director's entire job description as prepared by the District into his findings of fact. However, the Board will not engage in speculation as to what duties are to be performed by the Director, regardless of what is written in a job description. Rather, its analysis is limited to those duties actually performed. See Washington Township, supra (exclusions from bargaining units must be based upon actual job duties and not upon speculative duties which may arise); West Perry Sch. Dist. v. PLRB, 752 A.2d 461 (Pa. Cmwlth. 2000)(job title not sufficient to overcome the actual duties performed as evidence of supervisory status); County of Berks v. PLRB, 28 PPER ¶ 28234 (Berks County Court of Common Pleas, 1997)(Board makes unit determinations based upon actual duties of the employees at issue); In the Matter of the Employes of Lower Marion Sch. Dist., 32 PPER ¶ 32031 (Final Order, 2000) (to the extent employe had not yet performed supervisory functions in job description, PLRB will not rely on those duties for supervisory exclusion); Penns Manor Educ. Ass'n v. Penns Manor Area Sch. Dist., 30 PPER ¶ 30198 (Final Order, 1999)(future experience may create factual basis to support supervisory exclusion of newly-created position, however based upon actual job duties, position belongs in professional unit); In the Matter of the Employes of Bethel Park Sch. Dist., 18 PPER ¶ 18140 (Final Order, 1987)(Board's policy is to determine the status of positions based on the duties actually performed). The Hearing Examiner properly limited his analysis to the actual functions of the Director position and he appropriately refused to engage in speculation as to "job functions that were to be performed," as the District requests. (District, Br. at 8.) The Hearing Examiner incorporated the Director's job description as prepared by the District into his findings of fact, however, the District did not cite to any evidence that the Director actually performed job duties related to her

"primary function . . . to provide leadership, direction and supervision for all psychological services rendered to students . . . and to provide supervision and coordination on a District-wide basis." (District, Br. at 8-9.)

This case provides an excellent example of why the Board declines to base decisions regarding the status of employes on anticipated or newly added duties to existing or new employe job descriptions and rather relies on evidence of what duties the incumbent or predecessor has in fact performed. Here, the record shows that the District sought to fill the psychologist position with a candidate at higher than contract rates, the Association declined to agree to the higher rate and the District then altered the job description and declared the position out of the unit, all in order to hire a specific candidate at a salary higher than authorized under the CBA. The Hearing Examiner appropriately observed that the duties of the psychologist are essentially unvaried as before and the District's action was a subterfuge to avoid the CBA. Thus, the Hearing Examiner's alleged failure to base his decision on these speculative job duties was not an error.

Third, the District asserts that the Hearing Examiner failed to properly assess the supervisory duties of the Director position. Section 301(6) of PERA provides:

"Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6). Relative to the supervisory analysis, the Hearing Examiner found as fact that Ms. Gillespie was part of a committee that interviewed and recommended an applicant for departmental secretary and that she also directs the departmental secretary in the performance of her duties, in coordination with the assistant superintendent. Again, without citing to the notes of testimony, the District references "uncontradicted testimony" that the Director was involved in "[1] interviewing prospective employees, [2] recommending employees for ultimate hire by the School Board, [3] reviewing the performances of employees within the psychological services department, [4] recommending discipline to the School Board, [5] assigning work loads to employees and [6] daily supervision of employees." (District, Br. at 8.)

The Board will address the first two assertions together. The record reflects that Ms. Gillespie was a member of a committee that conducted interviews for a single departmental secretary position. Also serving on the committee were the assistant superintendent, the assistant superintendent's secretary and the superintendent's secretary. The committee jointly recommended Kathy Florindi for the position. While evidence of participation in the hiring process may be indicative of supervisory status, the burden of proof is on the party seeking to exclude a position as supervisory. Philadelphia Sch. Dist. v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998). It has been the Board's consistent position since the inception of PERA that to "effectively recommend" pursuant to Section 301(6), the recommendation must

be given controlling weight and cannot be subject to independent investigation by higher authority. Penns Manor, supra (citations omitted). The record reveals that the entire committee agreed to recommend Ms. Florindi. In a factually similar case, the Board held that a maintenance foreman was not supervisory, despite his participation on a committee to fill a custodial position. In the Matter of the Employees of Susquehanna County, 31 PPER ¶ 31129 (Final Order, 2000). In that case, the Board concluded that the foreman's recommendation of a candidate was not effective because the committee agreed upon that candidate and the record was unclear as to which candidate would have been recommended for hiring had the committee disagreed. The record is similarly unclear whether Ms. Gillespie's recommendation would have been effective had the assistant superintendent or another committee member disagreed upon the candidate. The Board explained that the "mere participation on a panel that interviews and recommends a candidate for employment is insufficient to support a supervisory determination." Id., p. 306 (citing State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999)).

The District's third assertion, that the Director was involved in "reviewing the performances of employees within the psychological services department" is without merit. (District, Br. at 8.) The Board rejects this claim for two reasons. First, the record reveals that while Ms. Gillespie will be responsible for preparing an evaluation of the part-time psychologist contracted from IU and the departmental secretary, she has not yet conducted any performance evaluations. As discussed above, the Board's analysis is centered upon the actual functions of the job and it will not speculate as to future responsibilities. Washington Township; West Perry Sch. Dist; County of Berks; Penns Manor; Bethel Park; supra. "An employe is considered a supervisor if he or she has authority to perform the functions listed [in Section 301(6) of PERA]; actually exercises that authority and uses independent judgment when so acting." PLRB v. McKeesport Area Sch. Dist., 14 PPER ¶ 14165, p. 355 (Final Order, 1983)(emphasis added). Second, the part-time psychologist is not an employe of the District and as the Hearing Examiner explained, "[t]he Board has determined that Section 301(6) of PERA 'expressly requires that the functions of a supervisor are with respect to other employes' and that 'the exercise of supervisory authority over persons who are not employes within the meaning of PERA does not support the exclusion from the bargaining unit.'" (PDO, at 8-9)(citing Teamsters, Local 430 v. Manchester Ambulance Club, 32 PPER ¶ 32039, p. 108 (Final Order, 2001); Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. PLRB, 383 A.2d 546 (Pa. Cmwlth. 1978)). Thus, the fact that Ms. Gillespie is expected to complete a performance evaluation on the departmental secretary at some point in the future does not support a supervisory exclusion from the professional collective bargaining unit.

The record does not support the District's fourth assertion that the Director "was involved in supervisory functions including . . . recommending discipline to the School Board." (District, Br. at 8.) To the contrary, in response to questioning by the Association's counsel, the District superintendent testified as follows:

- Q. Has Michelle Gillespie ever recommended the discipline of any employee at the Saucon Valley School District?
- A. Not to me, no.

- Q. Has she ever recommended discharge of any employee?
- A. No.
- Q. Has she ever recommended the employment of any future employee at the Saucon Valley School District?
- A. No.
- Q. Has she ever, as far as you know, rewarded any employee at the Saucon Valley School District? You know, rewarded by a letter of commendation, a raise, time off or compensatory time or anything of that sort?
- A. No.

(N.T. 33-34.) The Director has never recommended the discipline of any of the District's employees. Therefore, the Hearing Examiner did not err by failing to make this proposed finding.

The District's final two assertions that the Director was involved in the supervisory functions of "assigning work loads to employees and daily supervision of employees" likewise do not support the District's theory that the Director position is supervisory. (District, Br. at 8.) The only record evidence of assignments to, and supervision of, employees pertained to the departmental secretary and the IU's part-time psychologist. In response to questioning, Ms. Gillespie testified as follows:

- Q. [C]ould you tell us how much of your day, on an average basis, is spent in a supervisory capacity?
- A. Not a whole lot. I'd probably say maybe about 15 percent of the day. And most of that is working with the department secretary as well as the two days the half-time psychologist is on-site.

(N.T. 46-47.) Any assignments to, or supervision of, the IU's part-time psychologist are irrelevant because, as discussed above, that position is not held by an employee of the District. Manchester Ambulance Club, supra. Thus, Ms. Gillespie spends less than 15 percent of her day supervising a single District employee. "[I]t is entirely appropriate for the Board to consider such factors as frequency, duration and importance of the various supervisory duties performed." West Perry, supra at 465. In West Perry, the employees at issue were found to have "spent the majority of their time performing non-supervisory functions, making them rank and file employees not supervisors." Id. Likewise, the Board concludes that Ms. Gillespie spends the majority of her time performing non-supervisory functions and therefore the position she occupies is appropriately included in the professional bargaining unit. Further, Ms. Gillespie has never rewarded or sanctioned the departmental secretary and "mere evidence that a purported supervisor has directed other employees without evidence that the purported supervisor has also effected reward or sanction of employees is insufficient to demonstrate supervisory status." (PDO, at 9)(citing In the Matter of the Employees of the Pennsylvania State Univ. (Milton S. Hershey Medical Center), 20 PPER ¶ 20126 (Final Order, 1989)).

After a thorough review of the exception, brief in support and all matters of record, the Board shall dismiss the exception filed by the District 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 exception be and the same is dismissed and the Proposed Decision and Order be and the same is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle, Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of August, 2001. 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.

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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v. : Case No. PERA-C-00-380-E  
SAUCON VALLEY SCHOOL DISTRICT :

**AFFIDAVIT OF COMPLIANCE**

The Saucon Valley School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of PERA; that it has ceased paying Director of Psychological Services Michelle Gillespie a salary above that which is provided in the collective bargaining agreement for a similarly situated employe in the bargaining unit; that it has posted a copy of the Proposed Decision and Order and Final Order as directed therein; and that it has served a copy of this affidavit on the Association 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