

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-U-98-243-W
: (PERA-R-91-188-W)
BELLE VERNON AREA SCHOOL DISTRICT :
:

FINAL ORDER

On April 12, 1999, the Belle Vernon Area Education Association PSEA/NEA (Association) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Order of Dismissal (POD) entered by the hearing examiner on March 29, 1999. In the POD, the hearing examiner dismissed the Association's petition to clarify and amend the bargaining unit certified at PERA-R-91-188-W to include the position of athletic trainer. On April 19, 1999, the Belle Vernon Area School District (District) filed a response to the Association's exceptions and a supporting brief.

In the POD, the hearing examiner found the following facts, which are based on stipulations by the parties and are not contested in the exceptions. The Association is the bargaining representative of a unit of professional employes of the District. Joseph Ferreri currently holds the position of athletic trainer. Ferreri received a bachelor of science degree from California University, where he completed a dual major in education and athletic training. Ferreri is certified as an athletic trainer by the Bureau of Professional and Occupational Affairs, by the National Athletic Trainers Association and by the Commonwealth of Pennsylvania, Department of State.

The District has established the following qualifications for the athletic trainer position: a bachelor's degree in sports medicine and certification as an athletic trainer by the State of Pennsylvania and the National Athletic Trainers Association. The responsibilities of the athletic trainer include maintaining an inventory of all athletic medical supplies, issuing medical supplies to all athletic teams, preparing an annual medical supply budget, maintaining adequate security over all medical supplies and equipment, maintaining a record of all athletic injuries requiring the attention of the trainer or team physician, supervising rehabilitation programs, carrying out duties as directed by the team physician, attending all home and away varsity football games, attending as many home sporting events as scheduling will permit, maintaining an inventory of all athletic equipment, overseeing the reconditioning of all District athletic equipment, assisting the team physician in scheduling and conducting athletic physicals, maintaining an accurate file of athletic physicals for all sports teams, assisting the athletic director in preparation of the athletic equipment budget, acting as a liaison between the coaching staff and the team physician, initiating all referrals to the team physician regarding athletic injuries, assisting the athletic director in preparation of athletic schedules, helping distribute checks to officials, serving as supervisor of all athletic

events when the athletic director is absent, handling inquiries pertaining to athletics that are directed to the athletic office and supervising the drug testing program for athletes.

In his position as athletic trainer, Ferreri also treats major injuries such as cervical sprains and knee injuries, which cannot be assessed without the knowledge that he acquired by earning his degree at a university. Ferreri receives the same fringe benefits as teachers, including ten sick days and three personal days per year, and routinely interacts with members of the bargaining unit when performing his duties as athletic trainer. Ferreri is supervised by the principal of the District's middle school and examines any student needing nursing treatment at that school when the nurse is not present. Ferreri is certified as a social studies teacher and taught that course during a work stoppage in 1989. Several times a year, Ferreri teaches a class about steroids and other drugs.

The Association excepts to the hearing examiner's determination that the position of athletic trainer does not constitute professional employment and therefore should not be included in the existing professional employe bargaining unit. The hearing examiner's decision was not based on analysis of whether the employe at issue qualifies as a "professional employe" under Section 301(7) of the Public Employe Relations Act (PERA), but rather was based solely upon the hearing examiner's conclusion that this position does not fall within the definition of professional employe in the Public School Code of 1949 (School Code). The hearing examiner essentially held that the School Code is dispositive of professional employe status under PERA, relying on Harbor Creek School District v. Harbor Creek Education Association, 536 Pa. 474, 640 A.2d 899, 1994 (Harbor Creek I), Harbor Creek School District v. PLRB, 631 A.2d 1069 (Pa. Cmwlth. 1993) (Harbor Creek II), and two of the hearing examiner's own decisions where he relied upon the Harbor Creek litigation. See Bedford Area School District, 25 PPER ¶ 25014 (Proposed Order of Unit Clarification, 1993)(athletic director position excluded from professional employe bargaining unit); New Hope-Solebury School District, 25 PPER ¶ 25025 (Proposed Decision and Order, 1994)(no duty to bargain over position of athletic director with representative of professional unit).

We decline to follow the reasoning of the hearing examiner for several reasons. First, in School District of Township of Millcreek v. Millcreek Education Association, 440 A.2d 673 (Pa. Cmwlth. 1982), Commonwealth Court specifically held that the provisions of the School Code are not dispositive of employe status under PERA, stating as follows:

"The School District first argues that the PLRB erred in its decision since the Public School Code of 1949 does not include substitute teachers in its definition of 'teacher,' and the collective bargaining agreements between the Union and the School District have been limited in applicability to teachers and professional employees. We find no merit in this argument, since the provisions of the Public School Code are not dispositive of employee status under the PERA "

Id. at 675 (footnote omitted). Millcreek was not overruled in the Harbor Creek litigation, and indeed was not even mentioned.

Second, as noted by Commonwealth Court in its recent decision in Cranberry Area School District v. Cranberry Education Association, 713 A.2d 726 (Pa. Cmwlth. 1998), the Supreme Court decision in Harbor Creek I was more narrow than the decision of Commonwealth Court in that case:

"Though the Supreme Court noted [Commonwealth Court] case law which holds that disputes pertaining to extracurricular work performed by teachers [are] not arbitrable because it is not professional employment covered by the collective bargaining agreement, its legal analysis and conclusion is based on the 'essence test'

* * *

"Thus, as soon as it is determined that the issue is encompassed within the terms of the collective bargaining agreement, our scope of review ends"

Id. at 728-29.

Commonwealth Court then proceeded in Cranberry to uphold a grievance arbitration award which determined that the school district violated the collective bargaining agreement covering professional employes by not selecting a unit member for the extracurricular position of athletic director, even though the court found that a dispute over the same position was not arbitrable in Harbor Creek I. Thus, Cranberry indicates that Commonwealth Court is following the narrow ruling of the Supreme Court in Harbor Creek I, rather than its own broader ruling in that case (i.e., that extracurricular duties performed by teachers do not qualify as professional work because they do not fall within the definition of professional employment in the School Code).

Third, this case is distinguished from the Harbor Creek cases (and the above-cited decisions of the hearing examiner) because there is no issue here of whether extracurricular duties performed by teachers under supplemental contracts qualify as professional employment. For all of these reasons, we decline to follow the reasoning of the hearing examiner and will instead consider the pertinent issue of whether the athletic trainer position falls within the definition of professional employe in PERA.

As the Association points out in its exceptions, the issue of whether an athletic trainer in a school district is a professional employe under PERA was recently considered by another Board hearing examiner. See In the Matter of the Employes of Elizabeth Forward School District, 29 PPER ¶ 29015 (Proposed Order of Unit Clarification, 1997). In that case, the hearing examiner found that the athletic trainer performed work that qualifies under all four parts of the definition of professional employe that is set forth in Section 301(7) of PERA, which states as follows:

"'Professional employe' means any employe whose work: (i) is predominantly intellectual and varied in character; (ii) requires consistent exercise of discretion and judgment; (iii) requires knowledge of an advanced nature in the field of science or learning customarily acquired by

specialized study in an institution of higher learning or its equivalent; and (iv) is of such character that the output or result accomplished cannot be standardized in relation to a given period of time."

The hearing examiner's determination that the athletic trainer was a professional employe in Elizabeth Forward was based, at least in part, upon the examiner's finding that the athletic trainer treated major injuries such as cervical sprains and knee injuries, and that such injuries can only be assessed with the knowledge the trainer acquired by earning his degree at a university. The same finding was made here and supports the conclusion that the District's athletic trainer (Ferrerri) is a professional employe under PERA. As in Elizabeth Forward, the District's athletic trainer performs work that qualifies under all four parts of the definition of professional employe set forth in Section 301(7). Moreover, as noted by the hearing examiner in Elizabeth Forward, the Board has determined that possession of certification as a professional employe from the Department of Education is not dispositive of professional employe status under PERA. Thus, the Board has found that certain employes who lacked such certification were nevertheless professional employes under PERA. Colonial Northampton Intermediate Unit #20, 26 PPER ¶ 26022 (Proposed Decision and Order, 1994); Lebanon County Vocational-Technical School, 22 PPER ¶ 22110 (Order Directing Submission of Eligibility List, 1991). Conversely, the Board has found that an employe who was certified by the Department of Education was not a professional employe under PERA because her work did not require use of the knowledge which she obtained in receiving her degree. Girard School District, 21 PPER ¶ 21016 (Proposed Order of Dismissal, 1989). For essentially the same reasoning as the hearing examiner in Elizabeth Forward, we find that the athletic trainer in this case is a professional employe under PERA and therefore the bargaining unit certification should be amended and clarified to include this position.

After a thorough review of the exceptions and all matter of record, the Board shall sustain the exceptions, vacate the proposed order of dismissal consistent with the above discussion, and include the employe in the unit represented by the Association.

CONCLUSIONS

That Conclusions numbers 1 through 3 inclusive, as set forth in the Proposed Order of Dismissal, are hereby affirmed and incorporated herein by reference and made a part hereof.

That Conclusion number 4 of the Proposed Order of Dismissal is hereby vacated and set aside and an additional conclusion is made:

5. That the athletic trainer is a professional employe within the meaning of Section 301(7) 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 to the Proposed Order of Dismissal be and the same are hereby sustained, that the Order on page 4 of the Proposed Order of Dismissal be and the same is hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Association's certification is hereby amended to include the position of athletic trainer.

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 December, 1999. 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.