COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNS MANOR EDUCATION ASSOCIATION, PSEA/NEA	:	
	:	Case No. PERA-C-97-662-W
v.	:	
PENNS MANOR AREA SCHOOL DISTRICT	:	
IN THE MATTER OF THE EMPLOYES OF	:	
	:	Case No. PERA-U-98-185-W
PENNS MANOR AREA SCHOOL DISTRICT	:	

FINAL ORDER

On December 8, 1997, the Penns Manor Education Association, PSEA/NEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices against the Penns Manor Area School District (District). The charge alleged that the District violated Sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (PERA) by unilaterally declaring that the newly created position of Alternative Education Coordinator (AEC) would be considered a non-bargaining unit position. On December 18, 1997, the Secretary of the Board issued a complaint and notice of hearing, assigning the charge to conciliation and scheduling a hearing.

On April 20, 1998, the District filed a petition for unit clarification, pursuant to an agreement with the Association, to determine whether the position of AEC should be within the professional employe bargaining unit. Neither the charge nor the petition was resolved in agreement, so a consolidated hearing was held on May 15, 1998.

Post-hearing briefs were filed, and on August 28, 1998, the hearing examiner issued a consolidated proposed decision and order (PDO) and proposed order of dismissal (POD). It was concluded that the District had committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA. It was further concluded that the position of AEC is neither supervisory within the meaning of Section 301(6) of PERA, nor managerial within the meaning of Section 301(16) of PERA, and is thus within the bargaining unit as certified by the Board.

The District filed timely exceptions to the PDO with the Board. The District filed its brief in support of exceptions on December 21, 1998, and the Association's brief in opposition to the exceptions was filed on January 8, 1999. The District's exceptions assert that the hearing examiner erred by failing to make various findings of fact, by determining that the AEC is neither supervisory nor managerial under PERA, and by determining that the AEC is within the description of the bargaining unit as certified by the Board.

Upon review of the hearing examiner's disposition of the District's unit clarification petition, we agree with the conclusion that the AEC position is neither supervisory nor managerial within the meaning of PERA. However, regarding the unfair practice charge, we conclude that the AEC position

was not encompassed by the description of the bargaining unit as certified by the board in 1970, ("teachers, school counselors, school nurse, and librarian; and excluding supervisors, first level supervisors and confidential employes") and therefore, no unfair labor practice was committed prior to the unit clarification.

These cases arose out of the District's creation of the Alternative Education Coordinator position to oversee a new in-school suspension program at the high school. The program was created as a disciplinary alternative to out-of-school suspension for insubordinate students. The program requires students to spend the school day separated from the rest of the student body working on assignments provided by their teachers. After developing a job description for the professional level position,[1] the District appointed Ken Jubas as the first AEC.

The hearing examiner found that Mr. Jubas reviewed referrals by teachers of students to the program, decided what discipline was appropriate, and made recommendations regarding discipline to the principal of the high school (FF 8, PDO at 3). Jubas met with the in-school suspension monitor, who actually sits in the in-school suspension room with the students, on a daily basis to review the status of students in the program and to check her monitoring of the students (FF 8, PDO at 3). The hearing examiner found that Jubas once thought the monitor's attire was improper and explained to her what she should be wearing instead (FF 9, PDO at 4). On another occasion, he reviewed the credentials of employes on the substitute list and recommended to the principal that one be assigned to the monitor position on a temporary basis (FF 10, PDO at 4). He notified teachers whenever students finished assigned work, and he referred students to guidance counselors and outside agencies when needed (FF 8, PDO at 3). The District's early dismissals/late arrivals procedures were changed after Mr. Jubas was asked for his input to clarify attendance policies (N.T. at 68-69, 90; FF 11, POD at 4). The District argues in its exceptions

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[1] The job description for the AEC position included the following duties and functions:

(1) Share with the principal the responsibility for protecting the health and welfare of students.
(2) Assist the principal in all matters of routine discipline, which includes hall, restroom, and cafeteria monitoring, investigating reports of misconduct, questioning students and staff regarding discipline issues, and maintaining records of student behavior.
(3) Provide support to the in-school suspension monitor to maintain discipline, investigate and recommend counseling services and give recommendations to high school principal regarding behavioral management plans for individual students.
(4) Assist principal with scheduling and coordinate extracurricular program of school, excluding athletics.
(5) Coordinate student activity calendar, grades K-12, and building use schedule for non-athletic events in cooperation with the athletic director.
(6) Coordinate student body fundraising activities.
(7) May assist with district attendance duties as appointed.
(8) Assist administration in obtaining funding for At-Risk Students.

FF 5, PDO at 3.

that the AEC position is supervisory and managerial, and accordingly, excluded from the bargaining unit.

In support of its position that the AEC position is supervisory, the District argues that the AEC exercises direct supervisory control over the in-school suspension monitor. The Board has reviewed the record, and finds no error in the hearing examiner's failure to conclude that the AEC is supervisory, because there is sufficient evidence in the record to the contrary. The District relies on a single instance where Mr. Jubas recommended that the in-school suspension monitor wear more appropriate clothing as evidence of his supervisory control. The District couches the conversation between the AEC and the monitor as a disciplinary action. However, in a factually similar case, an employe was found to be non-supervisory because she had not disciplined employees beyond mere counseling. The Board has clearly stated that verbal counseling is not an indicia of supervisory authority. Lawrence County, 22 PPER ¶ 22120 (1991) (citing Danville Area School District, 8 PPER 195(Order and Notice of Election, 1977)). Further, "counseling" is not one of the eleven specifically enumerated indicia of supervisory status set forth in Section 301(6) of PERA. Mr. Jubas' conversation with the monitor more closely resembles a verbal counseling than a disciplinary action, and does not rise to the level of an exercise of supervisory authority under PERA.

The District next relies on the fact that the AEC reviewed prospective monitors' credentials from the District's substitute list, and made a recommendation to the principal to hire one of the substitutes as a temporary monitor. The District relies on the fact that the AEC then met with the new monitor to explain the District's rules and regulations, as evidence of supervisory status. The explanation of rules and regulations is characteristic of training, and training is not indicative of supervisory status under PERA.

The fact that the second monitor was selected based upon the AEC's review and recommendation is similarly not conclusive of supervisory status. 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. Chester County Solid Waste Authority, 18 PPER ¶ 18021 (Order Directing Submission of Eligibility List, 1986)(citing Lancaster County Commissioners, 3 PPER 208 (Court of Common Pleas of Lancaster, 1973); Keystone Central School District, 12 PPER ¶ 12044 (Nisi Order of Unit Clarification, 1981); Fayette County, 11 PPER ¶ 11307 (Proposed Order of Unit Clarification, 1980)). When questioned about who he had to check with to see if it would be acceptable to have the substitute teacher fill the monitor position temporarily, Mr. Jubas testified that he made the recommendation to the principal (N.T. at 98). The District failed to prove that the recommendation was effective, i.e. that once it was given to the principal, that it was not subject to his independent investigation. The principal was not called to testify at the hearing, and the record does not reveal that Mr. Jubas' recommendation was given controlling weight.

The monitor that Mr. Jubas recommended was placed into the position on a temporary, as-needed basis (N.T., at 85). This single recommendation to temporarily fill a monitor position does not support the finding that Mr. Jubas' judgment was given controlling weight in the District's hiring process. Absent such evidence, it cannot be determined on this record that Mr. Jubas' position rises to the level of a supervisor under PERA.

The District cites Butler Area School District, 16 PPER ¶ 16126 (Proposed Order of Unit Clarification, 1985) to support its position that even limited actions taken by employees in regards to hiring categorized them as supervisory. The hearing examiner correctly determined that such reliance is misplaced. Limited actions in the hiring process alone may not be sufficient to establish supervisory status, because the Board may take into consideration the extent to which supervisory and nonsupervisory functions are performed. Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988); Bedford Area School District, 24 PPER ¶ 24069 (Final Order, 1993). The hearing examiner properly weighed the evidence of supervisory and nonsupervisory functions of the AEC, and the determination will not be disturbed. "[I]t is entirely appropriate for the Board to consider such factors as frequency, duration and importance of the various supervisory duties performed . . . The Board [may] exercise[] its discretion by concluding that the indicia of supervisory status [a]re not present." State System of Higher Education v. PLRB, (Pa. Cmwlth. No. 3090 C.D. 1998; filed Aug. 13, 1999). In this Commonwealth Court's very recent decision, a core issue presented and decided was the relationship between Section 301(6) and 604(5) of PERA regarding the extent to which supervisory and nonsupervisory functions are performed. In SSHE, the Court affirmed the Board's final order holding that athletic coaches who sporadically performed supervisory duties regarding coaching assistants were not supervisory within the meaning of Sections 301(6) and 604(5). Similarly, the hearing examiner properly determined on this record that the AEC has not exercised the requisite frequency of supervisory authority to be excluded from the bargaining unit.

For the same reasons, the District's reliance on Commonwealth of Pennsylvania, 4 PPER 44 (Nisi Decision and Order, 1974) and Freedom Area School District, 9 PPER ¶ 9002 (Nisi Order Clarifying Certified Bargaining Unit, 1977) is misplaced. Contrary to the District's position, these earlier cases do not hold that an employe is supervisory regardless of the amount of time the employe spends performing the function or functions in Section 301(6). In Commonwealth, the record showed that the Special Education Teachers II were the "sole supervisory link" between the Special Education Teachers I and management, and the teachers whom they observed and evaluated could not get a promotion or salary increase without a favorable rating from them. No issue was raised or addressed by the Board in that case regarding the application of Section 604(5) of PERA. Further, the record here shows that the principal and superintendent exercised supervisory authority over the monitor. In Freedom, the Board held that an employe who effectively recommended the hiring of four employes, had the power to recommend disciplinary action, layoff, and discharge, qualified as a supervisor, even though he spent less than 50% of his time doing so. The record here falls far short of documenting the frequency and the "wide and inclusive range of effective supervisory functions performed" as did the record in Freedom. Neither Freedom nor Commonwealth support the proposition that the AEC is supervisory.

Based on this scant record, we are unable to exclude the AEC from the bargaining unit as a supervisor. We note that this charge and petition for unit clarification arose shortly after the creation of the AEC position. Additional experience may create a factual basis in the future to support the District's contentions regarding the alleged supervisory status of the AEC. The District may be entitled to file a subsequent unit clarification petition based upon such a development or change in facts.

In its exceptions, the District also contends that the AEC is managerial, and therefore excluded from the bargaining unit. The District contends that Mr.

Jubas was directly involved in the determination of policy, under Section 301(16) of PERA. The Board has interpreted the section as follows:

> The statute may be read to state a three-part test in determining whether an employe will be considered managerial. Those three parts are (1) any individual who is involved directly in the determination of policy; (2) any individual who responsibly directs the implementation of the policy; or (3) employes above the first level of supervision.

Commonwealth of Pennsylvania (Attorney Examiners I), 12 PPER ¶ 12131 (Final Order, 1981). In support of its position, the District contends that the AEC was clothed with the duty to review and redevelop the school district's policy on late arrivals and early dismissals, under the first part of the test. However, the record is less clear. The testimony of Dr. Meshanko reflects that he asked Mr. Jubas "for his input . . . to clarify attendance policies . . . [and the early dismissal, late arrival procedure] was developed by him. It was changed and suggestions [were] made by him. He changed the procedures that we had in place, clarified them" (N.T. at 69). See also FF 11, PDO at 4.

It was properly concluded that the record does not support the contention that the AEC's involvement in the change of procedures or in the administrative meetings extended beyond providing information or professional or technical expertise. Mr. Jubas testified that "I've been in administrative meetings where Dr. Meshanko would solicit to get any opinions or advice on recommendation for general programs" (N.T. at 90). Simply, Mr. Jubas attended an administrative meeting, he was asked by the superintendent for his input, and he provided it. This does not rise to the level of management.

In a similar case, athletic directors' participation on policy committees was rejected as support for managerial status, because the matters involved in the policy recommendations were matters within the athletic directors' professional expertise, and did not transcend their technical discipline. State System of Higher Education, 28 PPER ¶ 28046 (Final Order, 1997). Similarly, Mr. Jubas' participation in the clarification of attendance issues which led to the early dismissal/late arrival policy was within his professional expertise, as evidenced by his job duty (7) "[m]ay assist with district attendance duties as appointed" (FF 5, PDO at 3). The Board has held that "in cases in which professional employes are alleged to also be managerial . . . th[e] judgments of professional employes which transcend the technical discipline of the profession 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 task." Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988). The input provided by Mr. Jubas does not transcend the technical discipline of the AEC. Rather, the natural and normal performance of his duties included assisting with attendance duties. This enabled him to assist in the development of the new early dismissal/late arrival policy by clarifying attendance policies.

The District argues that the AEC directly implements policy, and is therefore managerial, because he must ensure that the school complies with the laws and school district policy that effect students with special education needs. When questioned about his contact with outside agencies, Mr. Jubas testified that "there have been occasions where I had to call the State Police . . . based on the actions of a student engaged in a fight

. . . There have been instances where . . . I felt the need to call Children and Youth . . . I've talked with the probation officers . . ." (N.T. at 88-89). There is no evidence that only management level employees can contact outside agencies in such emergencies, or that such contact is inherently a management function. Presumably, the school nurse, teachers, or guidance counselor could also call the police if a fight broke out in their presence. The logical extension of the District's argument would result in the exclusion of the entire professional unit as managerial simply because they may have access to additional or outside resources as needed.

In its final exception regarding alleged managerial status, the District proposes that the hearing examiner erred in failing to make a finding of fact that the AEC exercised independent judgment in determining the type and amount of discipline to be issued to students for violations of District policy. As discussed above, the independent judgement criteria applies to the determination of supervisory status of Section 301(6) of PERA, and is not applicable when determining managerial status under 301(16) of PERA. Thus, the exception is without merit.

Finally, the District argues that the hearing examiner erred in concluding that the AEC is within the description of the bargaining unit as certified by the Board. The Board has found that "where an employer creates a position that is clearly within the broad description of the bargaining unit as certified by the Board . . . the employer commits an unfair practice by unilaterally declaring the position excluded from the bargaining unit." Beaver County Community College, 23 PPER ¶ 23070 (1992) aff'd 24 PPER ¶ 24110 (Court of Common Pleas, Beaver County, 1993)(emphasis added). However, in 1970, when the Board certified this bargaining unit, the unit consisted of "teachers, school counselors, school nurse, and librarian." This description of the unit was not "broad" as contemplated by the Board in Beaver County Community College, and did not include alternative education coordinators. Therefore, the District did not commit an unfair labor practice prior to the disposition of its unit clarification petition by creating the position of the AEC, as a non-bargaining unit position. It cannot fairly be stated that the unit as described in 1970 encompassed the position of the AEC at the time of its creation in 1997.

Since the 1970's, the Board has more broadly described bargaining units in part to address the problems associated with the evolution of units. The broad description allows employers to add, delete, and modify positions within a broadly described bargaining unit (e.g. "all professional employees"). Under this policy of unit description, professional units are more broadly described to include all full-time and regular part-time professional employes, including but not limited to specific classes of professionals. "The Board broadly defines bargaining units . . . to obviate the need for the filing of numerous petitions for unit clarification for the Board to make a determination on each new position created or existing classification retitled." Beaver County Community College, supra.

Prospectively, this professional unit will be more broadly described as "all full-time and regular part-time professional employes, including but not limited to teachers, school counselors, school nurse, librarian, and alternative education coordinator; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act." This description will bring the professional bargaining unit into compliance with current Board policy. The Board does not preclude the possibility of some future unit clarification, should further experience support

the exclusion of the AEC, or other prospectively created positions, from the broadly described bargaining unit.

After a thorough review of the charge of unfair practices, supporting documentation, exceptions, and briefs, the Board shall sustain the exceptions in part, and vacate the Proposed Decision and Order, consistent with the above discussion.

CONCLUSIONS

That CONCLUSIONS numbers 1 through 3, 5 and 6, as set forth in the Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof.

That CONCLUSION number 4 of the Proposed Decision and Order is vacated and set aside.

7. That Penns Manor Area School District has not committed an unfair practice under Section 1201(a)(1) and (5) 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 above case numbers be and the same are sustained in part, that the Order on page 9 of the Proposed Decision and Order be and the same is hereby vacated and set aside.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

1. that the charge of unfair practices at Case No. PERA-C-97-662-W is dismissed and the complaint issued thereon is rescinded; and

2. that for the purpose of collective bargaining between Penns Manor Area School District and Penns Manor Education Association, the unit shall include all full-time and regular part-time professional employes including but not limited to teachers, school counselors, school nurse, librarian, and alternative education coordinator; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act.

SIGNED, SEALED, DATED and MAILED this twenty-second day of September, 1999.

PENNSYLVANIA LABOR RELATIONS BOARD

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JOHN MARKLE JR., CHAIRMAN

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L. DENNIS MARTIRE, MEMBER

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EDWARD G. FEEHAN, MEMBER