

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :  
: :  
: Case No. PERA-U-95-557-W  
: (PERA-R-4444-W)  
NORTH HILLS SCHOOL DISTRICT :

**FINAL ORDER**

On January 12, 1999, the Commonwealth Court of Pennsylvania issued an Opinion and Order reversing a decision of the Court of Common Pleas of Allegheny County which had affirmed a Final Order issued by the Pennsylvania Labor Relations Board (Board). The Commonwealth Court remanded the case to the Board for further proceedings. In the Final Order issued on March 18, 1997, the Board concluded, inter alia, that the position of Secretary to the Assistant Superintendent of North Hills School District (Employer), which position was held by Shirley Dougherty, was not a confidential position within the meaning of the Public Employee Relations Act (PERA) and was, accordingly, included in a bargaining unit of nonprofessional employees represented by the North Hills Educational Support Personnel Association, ESPA/PSEA/NEA (Association). In its Order, the Commonwealth Court directed the Board "to address the evidence of record that Shirley Dougherty performed confidential duties prior to the filing of the petition for unit clarification."<sup>1</sup> The Commonwealth Court cited specific testimony by Ms. Dougherty regarding proofreading duties that she performed prior to the filing of the Association's petition as possible evidence of her confidential status.

On April 22, 1999, the Board Secretary directed that the Association and the Employer file briefs in support of their respective positions on the question identified in the Commonwealth Court's Opinion and Order. The Association filed its brief on May 14, 1999, and the Employer filed a responsive brief on June 2, 1999.

Initially, the parties disagree on the scope of the Commonwealth Court's remand order. In its brief, the Association addresses the specific testimony cited by the Commonwealth Court as evidence of Ms. Dougherty's confidential status and argues that that evidence does not support Ms. Dougherty's confidential status because the testimony reveals Ms. Dougherty's false assumption that the memoranda that she proofread were confidential within the meaning of PERA. The Association also argues that the notion that the memoranda were confidential in the labor relations sense is contradicted by other testimony of Ms. Dougherty that her duties did not make her privy to the Employer's collective bargaining strategies. The Association would accordingly have the Board determine that the Employer failed to sustain its burden of proving Ms. Dougherty's confidential status. On the other hand, the Employer, citing language from the Commonwealth Court Opinion regarding Ms. Dougherty's proofreading duties, contends that the Board is limited to determining only whether Ms. Dougherty testified truthfully when she said that she proofread the memoranda at issue. The Employer contends that unless the Board determines that Ms. Dougherty perjured herself, the Board must reverse

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<sup>1</sup> In its decision, the Commonwealth Court affirmed the Board's long-standing policy to discount alleged confidential duties that are assigned to an employee only after the filing of a petition to include the position in a bargaining unit. The Board had applied this policy to new duties that were assigned to Ms. Dougherty after the Employer became aware of the Association's petition seeking her inclusion in the bargaining unit.

its previous decision that Ms. Dougherty's position is not confidential within the meaning of PERA. A fair reading of the Commonwealth Court's Opinion and Order reveals that the remand order is broader than envisioned by the Employer. The Commonwealth Court's Order directs the Board "to address the evidence of record that Ms. Dougherty performed confidential duties prior to the filing of the petition for unit clarification." Accordingly, the Board must address not only the testimony specifically cited by the Commonwealth Court, but must examine the record as a whole and determine whether Ms. Dougherty's pre-petition duties support a confidential exclusion.

The lead case in interpreting the confidential exclusion under PERA is PLRB v. Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978) (Altoona), in which the Pennsylvania Supreme Court specifically affirmed the Board's adoption of a narrow construction of the confidential exclusion stating as follows:

The PERA was enacted to accord public employes the right to organize and bargain with their employers. 43 P.S. § 1101.1101 . . . [T]he Board could properly determine that "associated with" was best read to exclude only those employes whose inclusion in the bargaining unit would seriously impair the employer's ability to bargain on a fair and equal footing with the Union.

389 A.2d at 557 (emphasis added). The Supreme Court went on to state:

We agree with the Board that the drafters of PERA did not intend to deny the benefits of public employe status to every employe however tangentially connected to collective bargaining negotiations.

389 A.2d at 58. With respect to the nature of the information to which an employe must have access in order to be excluded from the bargaining unit as a confidential employe the Board, in Bangor Area School District, 9 PPER ¶ 9295 (Nisi Decision and Order, 1978) stated as follows:

It is only when an employe is privy to the relevant determinations of the employer's policy that that person may be found to be confidential. The collective bargaining information must be of such a definite nature that the union would know of the employer's plans if said information is revealed.

9 PPER at 533. It is within the context of this case authority that the evidence of record must be examined to determine whether Ms. Dougherty's position is confidential within the meaning of PERA.

In its Opinion, the Commonwealth Court cited testimony of Ms. Dougherty regarding her duty of proofreading correspondence from the Assistant Superintendent (Mr. Santillo) to the school board as evidence of her confidential status within the meaning of PERA. The Commonwealth Court cited the testimony as follows:

Q. Those memoranda that he [Mr. Santillo] prepared for the Board on negotiations, then how did they get to the Board?

A. Well, first off whenever he does type his own memos he sends them out to me and has me proof them and then -- and then I copy them so that he has a copy for his file and then pass it onto Mr. Esaias' [the superintendent] office.

Q. Even these memorandums [sic] that Mr. Santillo prepared then, you actually read them; is that correct?

A. Right.  
Q. You had to proof them?  
A. Right.  
Q. And these were memorandums [sic] concerning the teachers' negotiations?  
A. Yes.

\* \* \*

Q. Were they confidential memorandums [sic] to the Board of education [sic]?  
A. Yes.

722 A.2d at 1158. However, in a colloquy between Mr. Abraham, counsel for the Association, and Mr. Witherel, counsel for the Employer, immediately following the last question and answer cited above, the Employer's attorney clarifies that the reference to "confidential" in the cited testimony was not a reference to "confidential" in the labor relations sense, but merely "confidential" in the lay person's understanding of that term. That exchange between the parties' attorneys is as follows:

ATTORNEY ABRAHAM: I would only ask that you clarify that. When you say confidential, you mean confidential meant for the Board's eyes only?

ATTORNEY WITHEREL: Yes. Yes.

ATTORNEY ABRAHAM: You're not making a legal conclusion there that they were confidential per the Act?

ATTORNEY WITHEREL: No, I'm not.

ATTORNEY ABRAHAM: Okay.

ATTORNEY WITHEREL: No, I'm not.

(N.T. 76). In this regard the Employer's own attorney admitted that his reference to "confidential" in his question to Ms. Dougherty regarding the memoranda she proofread for Mr. Santillo was not a reference to "confidential" under PERA, but merely confidential in the sense that the memoranda were not public but were for the school board members only. The record fails to reveal the substance of those memoranda because the Employer failed to introduce any of those memoranda as evidence at the hearing or to elicit any specific testimony from either Ms. Dougherty or Mr. Santillo regarding the contents of those memoranda. Those memoranda could have merely informed the school board of the time and location of the next bargaining session, transmitted a union proposal from a previous bargaining session or summarized what had occurred in a prior session, i.e., information that the union already knew. There is simply no substantial and credible evidence for the Board to make a finding of fact that the memoranda that Ms. Dougherty proofread contained information that complies with the requirement in Bangor School District, supra, as being of "such a definite nature that the union would know of the employer's plan if said information is revealed." 9 PPER at 533. Indeed, it cannot be said that by proofreading the memoranda, Ms. Dougherty was exposed to information that "would seriously impair the employer's ability to bargain on a fair and equal footing with the union." Altoona, supra, at 557.

When the Employer's counsel did attempt to elicit testimony from Ms. Dougherty regarding the nature of the memoranda and whether they described "either negotiations strategies or the status of the negotiations" (N.T. 76), Ms. Dougherty testified that she was "not sure about the strategies" (N.T. 76). Any conclusion that Ms. Dougherty's position is confidential within the meaning of PERA is further undermined by Ms. Dougherty's

testimony that she did not attend any bargaining strategy sessions with Mr. Santillo, that Mr. Santillo did not reveal any of the Employer's strategies to her before they were known to the union, that Mr. Santillo did not reveal the Employer's bottom line in negotiations to her and that she was unaware of the Employer's strategies with regard to collective bargaining negotiations (N.T. 73).

The only other duty with regard to collective bargaining negotiations performed by Ms. Dougherty was the shredding of negotiation worksheets that took approximately five minutes. The Board had previously concluded that this shredding was too minimal and attenuated to support a confidential exclusion from the bargaining unit. A comparison of the facts in Altoona, supra, supports the Board's conclusion in this regard. In Altoona, one of the secretaries at issue testified that over the years she had typed material regarding collective bargaining on two occasions. In rejecting a confidential exclusion the Supreme Court stated:

We agree with the Board that to deny these secretaries the salutary effects of public employe status based on such minimal connection with collective bargaining would distort the legislative intent to accord employes in the public sector the right to organize and have the benefit of union representation.

Altoona, supra, at 558. Ms. Dougherty's shredding of the negotiation worksheets similarly fails to warrant the Employer's requested exclusion of her position from the unit.

In its Opinion, the Commonwealth Court noted that the Board concluded that another position, Secretary to the Director of Fiscal Management and Support Services, held by Paula Perfetti, was a confidential position and excluded from the bargaining unit. The Commonwealth Court questioned Ms. Dougherty's inclusion in the unit in light of Ms. Perfetti's exclusion as confidential. The difference between the two positions is that in Ms. Dougherty's case, the Employer failed to support with record evidence its argument that Ms. Dougherty, in performing either the shredding or proofreading duties, was exposed to information that would reveal the Employer's collective bargaining strategies so as to seriously impair the Employer's ability to negotiate with the union on an equal footing. With regard to Ms. Perfetti, the Employer did adduce evidence that Ms. Perfetti prepared a document for the teacher negotiations entitled "North Hills School District Salary Offer" and also prepared worksheets for the teacher negotiations that included the Employer's proposals for a retirement incentive plan and a restructuring of the salary schedule contained in the existing collective bargaining agreement. These documents clearly revealed the Employer's collective bargaining strategy to Ms. Perfetti and her preparation of these documents supports her exclusion from the bargaining unit as a confidential employe. In contrast, the evidence with regard to Ms. Dougherty's position simply fails to rise to the level required for a confidential exclusion.

After a thorough review of all matters of record in light of the remand order of the Commonwealth Court dated January 12, 1999, the Board must conclude, as it did in the previous Final Order, that the position of Secretary to the Assistant Superintendent is not confidential within the meaning 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 unit certified by the Board Case No. PERA-R-4444-W is hereby amended to include the position of Secretary to the Assistant Superintendent. The certification issued by the Board in all other matters and respects shall be and remain in full force and effect.

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-seventh day of July, 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.

JOHN MARKLE JR. CHAIRMAN DISSENTS