COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF

:

: Case No. PERA-U-96-497-E

(PERA-R-674-C)

LUZERNE INTERMEDIATE UNIT NO. 18

FINAL ORDER

On September 22, 1998, Luzerne Intermediate Unit No. 18 (Employer) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a proposed order of unit clarification entered on September 2, 1998. The exceptions were accompanied by a request by the Employer for a thirty day extension in which to file its brief in support of exceptions. After two additional requests for extension of time in which to file its brief, the Employer filed its brief in support of exceptions on December 4, 1998.

In the proposed order of unit clarification the hearing examiner concluded that the positions of transition service specialist and treatment facilitator are properly included in a bargaining unit of professional employes represented by the Luzerne County Intermediate Unit No. 18 Education Association (Union) and certified by the Board at Case No. PERA-R-674-C. In its exceptions, the Employer contends that the hearing examiner erred in (1) concluding that the treatment facilitator was neither a supervisory nor management level position within the meaning of the Public Employe Relations Act (Act) and (2) concluding that the transition services specialist position is included in the professional bargaining unit because such inclusion unconstitutionally impairs the Employer's contract with the representative of the Employer's nonprofessional unit that includes the transition services specialist position.

After a thorough review of the exceptions and all matters of record, the Board hereby affirms findings of fact 1 through 8 inclusive in the proposed order of unit clarification and incorporates them herein by reference and makes the following:

ADDITIONAL FINDINGS OF FACT

- 9. That the treatment facilitator recommended the expansion of the alternative learning center to the executive director and the director of special education. The treatment facilitator's recommendation was accepted. Thereafter the treatment facilitator recommended the selection of a particular location for the program's expansion and that recommendation was also followed. (N.T. 17-18)
- 10. That the treatment facilitator made recommendations to the Employer's board of school directors recommending a more suitable building for the alternative education program, the separation of secondary and elementary students within the program, the addition of staff for the alternative education program and the extension of the alternative education program into the summer months. Those recommendations were followed by the Employer. (N.T. 21-23)

The Employer's exception with regard to the management level status of the treatment facilitator must be sustained. As the additional findings of fact reflect, the treatment facilitator has made recommendations with respect to the expansion of the alternative education program to a new facility, the extension of the program to the summer months, the separation in the program of elementary and secondary students and the selection of a particular site for the program's expansion. Section 301(16) of the Public Employe Relations Act (Act) defines a management level employe as follows:

"(16) 'Management level employe' means any 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). Under this definition, "management level" employe would include (1) any individual involved directly in the determination of policy, (2) any individual who responsibly directs the implementation of policy, or (3) employes above the first level of supervision. The Employer contends that the treatment facilitator is a management level employe as a result of that position's involvement in the determination of the Employer's policy with respect to the alternative education program. As the amended findings of fact reflect, the treatment facilitator does in fact make policy recommendations to the Employer regarding the overall direction of the alternative education program. The findings also reveal that the recommendations made by the treatment facilitator are effective. In this regard, the treatment facilitator is a management level employe within the meaning of the Act. See Pennsylvania Association of State Mental Hospital Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1989), pet. for allowance of appeal denied, 525 Pa. 590, 575 A.2d 119 (1990). It should also be noted that the extent to which management level duties are performed is not a consideration in the determination of management level status. If employes at any time are involved directly in the determination of policy or responsibly direct the implementation of policy, those employes are properly classified as management level employes. Carlynton School District v. PLRB, 377 A.2d 1033 (Pa. Cmwlth. 1977). In light of the treatment facilitator's involvement in the development of the Employer's policy regarding the alternative education program, the hearing examiner erred in concluding that the treatment facilitator was not a management level employe. The Board need not address the Employer's additional contention that the treatment facilitator is a supervisory employe because the determination of management level status excludes the treatment facilitator from any bargaining or meet and discuss unit under the Act.

The Employer's exception with respect to the transition services specialists is meritless. The Employer argues that because the transition services specialists are included in the nonprofessional bargaining unit and are currently covered by a collective bargaining agreement, the Board's inclusion of the transition services specialists in the professional bargaining unit would violate Article 1, Section 17 of the Pennsylvania Constitution which provides as follows:

"No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

Pa. Const. Art. 1, Section 17. The Employer contends that the Board's decision including the transition services specialist in the professional unit violates

this provision of the Pennsylvania Constitution, citing Danville Area School District v. Danville Area Education Association, 700 A.2d 549 (Pa. Cmwlth. 1997), pet. for allowance of appeal granted, 712 A.2d 287 (1988). Danville Area School District does not support the Employer's constitutional argument. That case involved an argument that a new legislative enactment retroactively amended the terms of an existing collective bargaining agreement between the parties. The Commonwealth Court disagreed and stated that "the laws that are in effect at the time the parties entered into a contractual relationship are merged with the rights and obligations set forth in the agreement, which may not be altered by subsequent legislation." 700 A.2d at 551-552. Here, the Public Employe Relations Act, passed by the Legislature almost thirty years ago, was in effect at the time the Employer negotiated the agreement with the nonprofessional bargaining representative and the Act set forth the Board's authority to make appropriate bargaining unit determinations. See 43 P.S. §1101.604. In accordance with Danville Area School District, the collective bargaining agreement was subject to the Board's authority, upon the filing of a unit clarification petition under the Act, to determine appropriate bargaining unit placement for any position covered by that contract. Further, the Board's inclusion of this classification in the professional bargaining unit merely raises the Employer's obligation to bargain with the Union over the wages, hours and working conditions of the transition services specialist. Marion Center School District v. Marion Center Education Association, No. 2246 C.D. 1998, unreported opinion (Pa. Cmwlth., 1999); Beaver County Community College, 23 PPER ¶ 23012 (Proposed Decision and Order, 1991), 23 PPER ¶ 23070 (Final Order, 1991), aff'd, 24 PPER ¶ 24110 (Court of Common Pleas of Beaver County, 1993); Carbon Lehigh Intermediate Unit 21, 18 PPER ¶ 18097 (Final Order, 1987). The employes in that position are not automatically covered by the terms of the existing professional collective bargaining agreement.

Finally, the Employer's argument disregards the underlying nature of a collective bargaining agreement, which is not a contract of employment between the employes and the employer, but is an agreement that as long as the employer is providing work in the nonprofessional classifications included in that agreement, the conditions of employment are as set forth in the agreement. <u>J.I. Case</u> v. NLRB, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed 762 (1944). However, when the employer alters the requirements of a position to such an extent that the position no longer falls within the appropriate unit covered by the contract, the unit clarification procedure provides a mechanism for the parties to remove the position from the unit. This analysis is equally applicable where the position is changed in such a way as to make inclusion in any unit inappropriate, such as where the employer assigns additional duties that would make the position confidential or management level within the meaning of the Act. In this case, the Employer does not contest the conclusion that this position is a professional position. However, the Employer seeks to benefit from the employes' performance of professional job duties, while at the same time arguing that the position cannot be placed in the professional bargaining unit. The existing nonprofessional agreement simply no longer applies to the professional position as a result of the Employer's alteration of the position. Therefore, the Employer's constitutional argument fails.

After a thorough review of the exceptions and all matters of record, the Board shall sustain in part and dismiss in part the exceptions filed by the Employer and make the proposed order of unit clarification final as amended.

CONCLUSIONS

set forth in the proposed order of unit clarification are hereby affirmed and incorporated herein by reference and made a part hereof.

That CONCLUSION number 4 of the proposed order of unit clarification is hereby vacated and set aside and the following additional conclusion is made:

6. That the position of treatment facilitator is professional within the meaning of Section 301(7) of the Act and is management level within the meaning of Section 301(16) of the Act.

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 Unit Clarification in the above-captioned matter be and the same are hereby sustained in part and dismissed in part, and the Proposed Order of Unit Clarification be and the same is hereby made absolute and final as modified herein.

SIGNED, SEALED, DATED and MAILED this twenty-fifth day of May, 1999.

PENNSYLVANIA LABOR RELATIONS BOARD
TOUR MADEL TO GUATOMAN
JOHN MARKLE JR., CHAIRMAN
EDWARD G. FEEHAN, MEMBER

MEMBER L. DENNIS MARTIRE DISSENTS