

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
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:  
Case No. PERA-U-02-10-E  
:  
(PERA-R-4259-C)  
LACKAWANNA CAREER :  
TECHNOLOGY CENTER<sup>1</sup> :

**FINAL ORDER**

On October 25, 2002, the Lackawanna County Vocational-Technical Federation of Teachers, Local 3876, AFT, AFL-CIO (Union) timely filed with the Pennsylvania Labor Relations Board (Board) exceptions and a supporting brief to a Proposed Order of Unit Clarification (POUC) issued October 7, 2002. In the POUC, the Hearing Examiner sustained the Petition for Unit Clarification filed by the Union and, based on a prehearing stipulation between the parties, concluded that the position of dean of students shall be included in the bargaining unit of professional employees at the Lackawanna Career Technology Center (School), the position of technical writer shall be included in the bargaining unit of nonprofessional employees. However, the Examiner concluded after a hearing that the position of information technology coordinator (ITC) shall be excluded from both bargaining units. On November 13 2002, the School filed its response in opposition to the Union's exceptions and a supporting memorandum of law.

After a thorough review of the Union's exceptions, the responses thereto and all matters of record, the Board makes the following:

**AMENDED AND ADDITIONAL FINDINGS OF FACT**

28. Thomas Moore, the ITC, developed the School's computer help desk policy. It was approved without change by Executive Director Vincent Nallo. As of the time of the hearing, the help desk policy had not been considered by the School board. (N.T. 98; Respondent Exhibit 3).

30. Mr. Moore has unlimited access to all computerized administrative, business, personnel and collective bargaining files of the School. He has access to all rooms and offices at the School. Mr. Moore's unlimited access to secured computerized information is necessary to resolve problems arising with computers being used for various managerial functions by certain managers and administrators. Mr. Moore could not perform his job effectively if he was denied access to certain privileged materials. (N.T. 72-75, 93, 95, 102-104).

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<sup>1</sup>In Finding of Fact No. 2 of the POUC, the Examiner finds that the parties stipulated that the name of the School in fact has changed to the Lackawanna Career Technology Center.

## DISCUSSION

In its exceptions, the Union claims that Findings of Fact numbers 19, 20, 27, 28 and 29 are unsupported by substantial evidence. After reviewing the Examiner's citations to the record in support of those findings and the record as a whole, the Board concludes that Findings of Fact numbers 19, 20, 27 and 29 are indeed supported by substantial, competent evidence and shall not be disturbed. PLRB v. Kaufmann Department Stores, 345 Pa. 398, 29 A.2d 90 (1942)(stating that substantial evidence is relevant evidence as a reasonable mind might accept as adequate to support a conclusion); Appeal of Cumberland Valley Sch. Dist., 483 Pa. 134, 394 A.2d 946 (1978) (stating that findings of the Board that are supported by substantial evidence are conclusive). In support of its position, the Union directs the Board's attention to parts of the record not cited or relied upon by the Examiner. However, the law is well-established that "the hearing examiner's function, and the Board's on exceptions, is to resolve conflicts in evidence, make findings of fact from conflicting evidence and draw inferences from those findings of fact." AFSCME District Council 88 v. Warminster Township, 31 PPER ¶ 31156, 372 (Final Order, 2000). "Often there is substantial evidence to support two different, conflicting findings, but it is sufficient that there is substantial evidence to support the Board's finding; it is insufficient on exceptions to argue that there is substantial evidence to support a contrary finding." Id. Therefore, the Union cannot select favorable, conflicting evidence to challenge the Examiner's finding when the Examiner's primary function is to resolve conflicts in evidence and the Union has presented no compelling circumstances to warrant interfering with the Examiner's resolution of those conflicts.<sup>2</sup> Id. (stating that the Board maintains a long-standing policy of deferring to the credibility determinations of its examiners which will not be disturbed absent compelling circumstances).

However, part of Finding of Fact number 28 is not supported by substantial evidence. Finding of Fact number 28, as written in the POUC, states, "[t]hat Moore developed the School's computer help desk policy. It was adopted without change by the Director Nallo and used by the School." (POUC F.F. 28). At the time of the hearing, the School's board of directors had not considered or evaluated the help desk plan. (N.T. 98). Also, there is no substantial evidence that the School had used the plan as of the time of the hearing. Accordingly, Finding of Fact number 28 is amended herein to accurately reflect the evidence of record.

Next, the Union challenges conclusion number 6 in the POUC wherein the Examiner concluded that the ITC position is not professional within the meaning of Section 301(7) of the Public Employee Relations Act (PERA) and does not share a community of interest with the employees in the professional bargaining unit. In the POUC, the

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<sup>2</sup> The Board notes that much of the proposed alternative evidence, and the inferences permitted to be drawn therefrom, upon which the Union seeks to focus the Board's attention also constitutes substantial evidence in support of the challenged findings of fact and does not necessarily conflict with the evidence credited by the Examiner.

Examiner concluded that Mr. Moore did not satisfy the third prong of the conjunctive statutory standard for professional employe under Section 301(7) of PERA.<sup>3</sup> Specifically, the Examiner concluded that Moore was not a professional employe because "the Board has held that the third prong of the test for professional employe requires proof that the occupant in the position holds at least a bachelor's degree" and because "it is unclear if [his associate's degree] was related to computers." (POUC at 5). However, the Board has not concluded that, as a matter of law, a minimum of a bachelor's degree is the sine qua non of satisfying the third prong of the definition of professional employe or that the lack thereof automatically disqualifies an employe from obtaining professional status within the meaning of PERA.

The Examiner relied upon the following three cases: In the Matter of the Employes of Williamsport Area Community College, 1 PPER 57 (1971); In the Matter of the Employes of the City of Bethlehem, 21 PPER ¶ 21176 (Proposed Decision and Order, 1990), 22 PPER ¶ 22094 (Final Order, 1991), aff'd, 23 PPER ¶ 23098 (Court of Common Pleas, Northampton County, 1992); Luzerne County, 29 PPER ¶ 29056 (Proposed Decision and Order, 1998), aff'd, 29 PPER ¶ 29145 (Final Order, 1998). In Williamsport, the Board's decision that nurses at the college were not professional was not based on the fact that the nurses did not possess a bachelor's degree level of education. Rather the fact that those nurses were not required to pursue either certification or a bachelor's degree was one of the determinative factors considered by the Board. The Board stated that the nurses "are not certified nor required to earn a B.S. degree." Williamsport, 1 PPER at 58. In the discussion, the Board reiterated that the nurses "are not required to be certified or to earn a B.S. degree." Id. at 59. Accordingly, although the language in Williamsport is unclear regarding whether certification with less than a bachelor's degree level of higher education could satisfy the educational criteria for a professional employe, the Board in that case did not mandate that an employe hold a bachelor's degree, as a matter of law, in all cases to obtain professional status.

In City of Bethlehem, the Board, in concluding that paramedics did not satisfy the educational requirements for professional employes, stated that "[w]hile the level of training for paramedics is greater than the training for emergency medical technicians, the level of training required for a paramedic falls below the level required to

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<sup>3</sup> Section 301(7) of PERA provides the following:

"Professional employe" means any employe whose work: (1) 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.

obtain an associate's degree." City of Bethlehem, 22 PPER ¶ at 217. Accordingly, the Board has expressly opined that an employe with an associate's degree could satisfy the educational requirements. In affirming the Board in City of Bethlehem, the Court of Common Pleas of Northampton County opined that "the determining factor under the Act [PERA] is the quality of the education, not the quantity or amount of education received." City of Bethlehem, 23 PPER at 245-46. The City of Bethlehem Court further concluded that "[t]here simply [was] no evidence that paramedics receive their training 'in an institution of higher learning or its equivalent.'" Id. at 246. Accordingly, although it is clear that some level of education in an institution of higher learning is required, the Board and the courts have sanctioned a level of education at an institution of higher learning below the bachelor's degree level. Therefore, Mr. Moore's associate's degree in engineering technology is not insufficient, as a matter of law, under the third prong of the definition of professional employe in Section 301(7) of PERA, and the Examiner erred in so concluding.

However, the Union failed to meet its burden of proving that Mr. Moore's degree was necessary to the performance of his job duties in the ITC position. In In the Matter of the Employes of State System of Higher Education (SSHE), 28 PPER ¶ 28046 (Final Order, 1997), the Board stated that "[i]t is significant to note in this regard that Section 301(7) does not focus on whether the employer requires a degree of any sort but rather whether the work to be performed requires a degree in the discipline as a requirement to perform that work." Id. at 99. In SSHE, the Board further concluded that where an employe holds a degree that is unrelated to his job duties, that degree is insufficient to support a finding of professional status. Id. In the POUC, the Examiner stated that Moore "does hold an engineering degree, but it is unclear if this degree was related to computers." (POUC at 5). Accordingly, the record does not support the conclusion that Moore's associate degree reflects a required or necessary specialized study to perform his job duties or, at a minimum, that it was even related to his duties in the position of ITC. Therefore, the Hearing Examiner properly concluded that, on this record, Mr. Moore's education failed to satisfy the third prong of the professional-employe standard under PERA.

In contrasting Mr. Moore's job duties from those of the teachers in the professional unit, the Examiner stated the following:

The facts of his [Moore's] employment are not like those of the positions in the professional unit. Unlike the teachers in the unit, he does not teach students. He holds no teaching certificate. His work year is closer to that of the administrative staff than it is to the nine month year for teachers.

(POUC at 5). These conclusions are supported by the findings of fact and the substantial evidence of record. Accordingly, the Board will not disturb the Examiner's conclusion that the ITC does not have a community of interest with teachers in the professional bargaining unit.

The Union also excepts to conclusion number 7 in the POUC wherein the Examiner concluded that Mr. Moore is a management level employe. Section 301(16) of PERA provides as follows:

"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). In Pennsylvania Ass'n of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1989), the Commonwealth Court adopted the Board's test for determining whether an employe is a management level employe under Section 301(16). This test provides that an employe will be managerial if any one of the following three factors are established: (1) the employe is involved directly in the determination of policy; (2) the employe directs the implementation of policy; or (3) the employe is above the first level of supervision. Id. at 1023.

The Examiner made the following findings of fact, which are supported by substantial competent evidence. Mr. Nallo, the Executive Director, relies a great deal on Moore for policy making in the area of computer technology. (F.F. 21). Mr. Moore devised the current acceptable computer use policy without help from any other employe, which was adopted without change by Mr. Nallo. (F.F. 22). Mr. Moore has developed the School's one-year technology plan, which proposes improvements to computer hardware, software, staff development and plan monitoring. Moore also developed the School's computer help desk policy, which was adopted without change by Executive Director Nallo. (F.F. 28). Mr. Moore is also currently involved in making budgets for the purchase of new computer technology as part of his development of the School's three-year technology plan. Accordingly, the record evidence clearly supports the conclusion that Mr. Moore repeatedly developed policies affecting the School's computer program. Moreover, Mr. Moore is given great latitude in purchasing expensive computer hardware and software to maintain a modern computer system. Mr. Moore's job performance clearly satisfies the first of the three disjunctive standards to find him to be a management level employe. Therefore, the Examiner properly concluded that Mr. Moore is a management level employe.

After a thorough review of the exceptions, response thereto, supporting briefs and all matters of record, the Board shall sustain, in part, and dismiss, in part, the Union's exceptions and make the Proposed Order of Unit Clarification, as modified, absolute and 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 exceptions filed in the above-captioned matter are hereby sustained, in part, and dismissed, in part, and the Proposed Order of Unit Clarification, as modified, is hereby 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 Anne E. Covey, this seventeenth day of December, 2002. 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.