

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-U-97-274-W
: (PERA-R-10-W)
ERIE CITY SCHOOL DISTRICT :

FINAL ORDER

On November 16, 2001, Erie City School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Dismissal issued on October 31, 2001, by a Board hearing examiner. The exceptions were accompanied by a request by the District for an extension of time to file its brief, which was granted by the Board Secretary. On December 20, 2001, the District filed its brief in support of its exceptions. On January 14, 2002, the Erie Education Association, PSEA/NEA (Association) filed its brief in opposition to the District's exceptions.

This case involves a petition for unit clarification filed by the District seeking to exclude various extra-curricular positions from the professional bargaining unit represented by the Association under the Public Employee Relations Act (PERA). The District contended in the petition that the positions at issue were not "professional" within the meaning of PERA and therefore should be excluded from the Association's professional bargaining unit.

The District and the Association submitted a stipulation of facts to the hearing examiner setting forth the general responsibility for each position at issue and the fact that no certification from the Pennsylvania Department of Education (PDE) is required for those positions. Thereafter, the District filed a motion in limine and a memorandum in support of that motion requesting that the hearing examiner bar any further testimony or evidence other than the jointly filed stipulation. The District contended that the extra-curricular positions that do not require PDE certification as a professional employe under the Public School Code are nonprofessional employes as a matter of law. The District relied upon Harbor Creek School District v. Harbor Creek Education Association, 606 A.2d 666 (Pa. Cmwlth. 1992) *aff'd*, 536 Pa. 574, 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 School District of the Borough of Morrisville v. Morrisville Education Association, 644 A.2d 252 (Pa. Cmwlth. 1994) (Morrisville) for its contention that absent PDE certification as a professional employe, the positions cannot be professional within the meaning of PERA. On March 24, 1999, the hearing examiner granted the District's motion in limine and barred further testimony.

On October 31, 2001, a hearing examiner¹ issued a Proposed Order of Dismissal in which he made findings of fact consistent with the parties' stipulations and rejected the District's contention that Harbor Creek I, Harbor Creek II and Morrisville dictate that the absence of PDE professional certification under the Public School Code requires the Board to conclude that the positions are nonprofessional for purposes of PERA. In doing so, the hearing examiner relied upon the Board's decision in Belle Vernon Area School District, 30 PPER ¶ 30078 (Proposed Order of Dismissal, 1999), 31 PPER ¶ 31017 (Final Order, 1999). Belle Vernon School District was decided after the original hearing examiner granted the District's motion in limine but before any decision was rendered in this case. In Belle Vernon School District, the Board reversed a hearing examiner's decision that dismissed the petition to amend the professional employe bargaining unit to include the position of athletic trainer. The hearing examiner had determined that because the position did not require PDE professional certification under the Public School Code, the position was not professional for purposes of PERA. In reversing the hearing examiner, the Board stated as follows:

"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 I], [Harbor Creek II], and two [hearing examiner decisions which] 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

¹ The hearing examiner originally assigned this case left the Board's hearing examiner staff and the case was reassigned to and decided by a different hearing examiner than the one that granted the District's motion in limine limiting testimony to the parties' stipulations.

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 bar-gaining 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 employees 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).

* * *

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."

31 PPER at 41-42. The Board made it clear in Belle Vernon Area School District that mere reliance on the lack of PDE certification as a professional employe would not result in the Board's automatically concluding that the position is nonprofessional for purposes of PERA. Belle Vernon Area School District was issued in 1999, well prior to the hearing examiner's Proposed Order of Dismissal in this case. In spite of the Board's decision in Belle Vernon Area School District, the District, in its exceptions, continues to advance this rejected contention. Additionally, the District does not request, in light of the Board's decision in Belle Vernon Area School District, that it be given the opportunity to adduce additional evidence on the positions at issue in this case. Rather, in its brief in support of exceptions, the District cites facts not of record (District's brief, pp. 12-13) and contends that "...it is common and general knowledge" that the supplemental positions at issue do not meet the four-part test for professional employe status under PERA. (District's brief, p. 13) Given the broad range of positions at issue here, from coaching positions to high school newspaper advisor, the Board cannot rely upon such generalizations to make its determination. It was the District's burden, as the party seeking to exclude positions from the bargaining unit, to prove by substantial evidence on the record its contention that the positions at issue were not professional within the meaning of PERA. School District of Philadelphia v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998). Given the state of the record in this case and the District's insistence that it has proven its case on the record, we must dismiss the District's exceptions and affirm the Proposed Order of Dismissal issued by the hearing examiner.

After a thorough review of the exceptions and all matters of record and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the District be and the same are dismissed, and the Proposed Order of Dismissal issued by the hearing examiner be and the same is 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 Member L. Dennis Martire, this sixteenth day of April, 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.