

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
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: :
STROUDSBURG AREA SCHOOL DISTRICT : Case No. PERA-U-03-508-E
: (PERA-R-849-C)
:

FINAL ORDER

Stroudsburg Area School District (Employer) filed timely exceptions and a Supporting Brief with the Pennsylvania Labor Relations Board (Board) on October 20, 2004¹ from a Proposed Order of Unit Clarification issued September 30, 2004, wherein the hearing examiner concluded that the position of building substitute teacher is a professional position within the meaning of the Public Employee Relations Act (PERA) and exhibits an identifiable community of interest with the remaining professional employees of the Employer who are represented by the Stroudsburg Area Education Association, PSEA/NEA (Association). Accordingly, the hearing examiner directed that the position of building substitute teacher be included in the bargaining unit represented by the Association and certified by the Board at Case No. PERA-R-849-C. On November 4, 2004, the Association filed its response to the Employer's exceptions and a request for an extension of time to file its brief in support of that response. The Association's request for an extension was granted by the Board Secretary and the Association filed its brief on December 7, 2004.

In the Proposed Order of Unit Clarification the hearing examiner found that the Employer employs the following three classifications of substitute teachers: (1) long-term substitutes who work at least 45 consecutive days; (2) per diem substitutes and (3) building substitute teachers. The building substitute teachers are hired early in the school year for the duration of the school year to provide classroom instruction to students where the normally assigned teacher is absent and are directed to report every day to their assigned school buildings. Building substitute teachers are paid a daily rate of \$75 and receive an additional one-time stipend of \$450 after 30 days of accumulated service to the Employer. The building substitute teachers report to their assigned school building each day unless previously directed to report to another school building within the school district. The hearing examiner found that in the 2003-2004 school year, the Employer employed 16 building substitute teachers. Some of

¹ On November 22, 2004, the Employer filed what was styled as "amended exceptions" with the Board. Section 95.98 of the Board's rules and regulations sets forth a 20-day period within which exceptions to a hearing examiner's decision may be timely filed. 34 Pa. Code § 95.98. Although the Employer contends that its "amended exceptions" do not alter the substance of its original exceptions, the Board's rules do not permit the consideration of the Employer's "amended exceptions" as they were filed beyond the permissible exceptions period.

those individuals had been employed as building substitute teachers every year since 2000. The building substitute teachers perform classroom teaching duties in place of absent full-time teachers and when there is no classroom work available, the building principal directs the building substitute teachers to perform other teacher-related duties such as working in small student groups, assessing students, assisting the reading room teacher and co-teaching in various classrooms. The building substitute teachers are supervised by the building principals, as are the regular full-time teachers who are included in the bargaining unit. The building substitute teachers work the same daily hours as regular teachers and generally follow the lesson plans left by the full-time teachers for whom they are substituting. The building substitute teachers hold Bachelor's Degrees and are certificated by the Pennsylvania Department of Education to perform classroom-teaching work, as are the regular teachers included in the bargaining unit.

In its exceptions the Employer initially challenges 13 of the 15 findings of fact made by the hearing examiner and also challenges the hearing examiner's conclusion that the building substitute teachers are professional employees who have an identifiable community of interest with the employees in the existing bargaining unit.

The Employer's exceptions to the hearing examiner's findings of fact are either directly contradicted by the record, are irrelevant to the inquiry at issue or constitute an allegation that the hearing examiner failed to make additional findings of fact that the Employer contends would support its position that the building substitute teachers should be excluded from the bargaining unit. For example, the Employer challenges finding of fact three, which is merely a recitation of the Board's existing certification of the Association as the exclusive representative of a bargaining unit of professional employees of the Employer. The Employer faults the hearing examiner for failing to further find that long-term substitute teachers are specifically included in the collective bargaining agreement between the Employer and the Association and that per diem substitute teachers are specifically excluded from that agreement. The treatment in the collective bargaining agreement of long-term substitute teachers and per diem substitute teachers is irrelevant to the inquiry at issue at this case, i.e. whether or not the building substitute teachers should be included in the existing professional bargaining unit by virtue of this petition for unit clarification.

The Employer challenges finding of fact four in which the hearing examiner concluded that the District hires three types of substitutes (long-term substitutes, building substitutes and per diem substitutes). The Employer alleges that it only hires long-term substitute teachers and per diem substitute teachers. However, the Employer's contention is directly contradicted by its own appointment letter, introduced by the Employer as Exhibit D-2, sent to the building substitute teachers that states that " you have been placed in the position of building substitute. . ." The Employer challenges various other findings of fact of the hearing examiner based upon the hearing examiner's failure to find that differences exist between the building substitute teachers and the full-time professional teachers included in the bargaining unit. For example, the Employer challenges the hearing examiner's failure to find that the building substitutes do not prepare their own

lesson plans, grade for the overall achievement of their students or attend in-service or Act 80 days as do the regular full-time teachers included in the bargaining unit. However, the hearing examiner's decision is not based upon his conclusion that the building substitute teachers are exactly the same as the regular full-time teachers included in the bargaining unit, but that there exists a sufficient commonality between the two that they may be included in the same bargaining unit. The hearing examiner's findings of fact have been reviewed by the Board and accurately reflect the nature of the building substitute teachers' employment in the school district. In Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 526 (1975) the Pennsylvania Supreme Court stated as follows:

"When the fact-finder in an administrative proceeding is required to set forth his findings and adjudication, that adjudication must include all findings necessary to resolve the issue raised by the evidence in which are relevant to a decision."

464 Pa. at 287, 346 A.2d at 561. See also Birriel v. Workmen's Compensation Appeal Board, 435 A.2d 292 (Pa. Cmwlth. 1981). Accordingly, the hearing examiner's findings of fact will not be amended or supplemented.

The Employer next contends that the building substitute teachers are not professional employes within the meaning of PERA. Section 301(7) of PERA provides as following:

" Professional employe" means any employe whose work: (i) 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 relations to a given period of time."

43 P.S. § 1101.301(7)

The Employer contends that the building substitute teachers do not perform work that is predominately intellectual and varied in nature and that requires the consistent exercise of discretion and judgment. The Employer bases its contention in this regard upon the notion that the building substitute teachers merely follow the lesson plans left by the full-time teacher for whom they are substituting and, therefore, the building substitute teachers are not exercising any discretion in their teaching. The argument that a substitute teacher performing classroom teaching duties, albeit following a lesson plan prepared by another teacher, is not performing work that is intellectual and varied in nature and does not require the consistent exercise of discretion and judgment strains credulity and must be rejected. The Employer has cited no case in which the performance of teaching duties such as those at issue here are not concluded to be professional work within the meaning of PERA. See e.g., Richland Education Association v. Richland School District, 418 A.2d 787 (Pa. Cmwlth. 1980) ("preferred substitutes" who, like the building

substitute teachers at issue in this case, are hired on a full-time basis to perform work as substitute teachers, are included in a bargaining unit of professional, school district employes).

The Employer next challenges the hearing examiner's conclusion that the building substitute teachers have an identifiable community of interest with the other professional employes in the bargaining unit. With respect to the application of the test for community of interest among employes for the purpose of ascertaining their propriety of including various groups of employes in a given unit, the Commonwealth Court has stated that the factors involved in determination of community of interest include ". . . the employees' skills, their duties, areas of work, working conditions, interchange of employes, supervision, grievance procedures, hours of work, trade requirements, pay scales, and employee desires." Allegheny General Hospital v. PLRB, 322 A.2d 793, 797.

With respect to the building substitute teachers' community of interest with the other employes including in the professional bargaining unit, the building substitute teachers possess similar skills, perform the same classroom teaching duties, although the full-time teachers for whom they substitute prepare lesson plans and grade the students for overall achievement in the various marking periods, they work in the same location and under the supervision of the same individual, the building principal, during the same hours of work. The building substitute teachers are required to have Pennsylvania Department of Education Professional Certification and the "varied" nature of their work is evidenced by the fact that they substitute for the full-time teachers. Although the Board recognizes that there are differences between the full-time teachers and the building substitute teachers, the Board and the courts have recognized that the employes need not have an identical community of interest in order to be included in the same bargaining unit, but need only have an identifiable community of interest and that some differences may exist in wages, hours and working conditions without destroying the identifiable community of interest. Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. Court 1990), Pet. for allowance of appeal denied, 525 Pa. 652, 581 A.2 577 (1990), West Hanover Township v. PLRB, 646 A.2d 625 (Pa. Cmwlth. Court 1994): Western Psychiatric Institute and Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. Court 1974), Pet. for allowance of appeal denied, February 28, 1975; West Perry School District v. PLRB, 752 A.2d 461 (Pa. Cmwlth. Court 2000), Pet. for allowance of appeal denied, 568 A.2d 675, 795 A.2d 984 (2000). Accordingly, the hearing examiner's conclusion that an identifiable community of interest in exists between the bargaining unit employes and the building substitute teachers is supported by the record and the case law and will not be disturbed.

The Employer finally contends that the building substitute teachers do not exhibit an expectation of continued employment such that they have a sufficient interest in the bargaining unit to be included in the same unit as the other professional employes. In School District of the Township of Millcreek v. Millcreek Education Association, 440 A.2d 673 (Pa. Cmwlth. 1982), the Commonwealth Court affirmed the Board's test to examine whether an employe has an expectation of continued employment in which the Board examines whether or not the employe at issue has worked for a substantial period of time

in the current semester and has either worked for a substantial period of time in a previous semester or has the possibility of employment for a substantial period of time in the next semester. The hearing examiner correctly concluded that the facts in this case demonstrate that the building substitute teachers meet the Millcreek test. The building substitute teachers, as noted above, share an identifiable community of interest with the other professional employes and are generally hired in early October for employment for the duration of the school year. The building substitute teachers are directed to report to their assigned building every day for the remainder of the school year. Accordingly, in any one school year, the building substitute teachers will work a substantial number of days in the first school semester and are directed by the Employer to report to work for a significant number of days in the second school semester. Further, many of the building substitute teachers have returned to perform services for the Employer as building substitute teachers year after year. Under these facts, the building substitute teachers clearly meet the Millcreek test and have an expectation of continued employment for the Employer.

Further, the Board has previously addressed the status of substitute teachers who, like the building substitute teachers here, provide consistent and repeated service to the employer. In Philadelphia School District, 5 PPER 113 (Order Directing Pre-Election Conference, 1974), the Board rejected the argument made by the Employer here that the substitute teachers should be considered casual employes excluded from any unit because of the per diem nature of their service. In doing so, the Board stated as follows:

The need to cover absences of teachers is not occasional or temporary from the Employer's frame of reference, it is permanent. To meet the need, the Employer has established a procedure of registering personnel to work on an as needed basis. Whenever a vacancy arises the Employer taps this available pool of labor to fill its recurrent needs.

5 PPER at 114. The Board went on to state as follows:

The nature of the employment of per diem substitute teachers by the Employer in this case shows a continuity and reasonable frequency of employment to support a finding of an identifiable community of interest among the per diem substitutes distinguishing them from casual employes.

Id. at 115. So too here, the Employer has hired the building substitute teachers to fill a recurrent need and the building substitute teachers provide repeated and consistent service to the Employer just as the substitute teachers in Philadelphia School District. Accordingly, the hearing examiner's conclusion that they should be included in the unit must be affirmed.

After a thorough review of the October 20, 2004 exceptions and all matter of record the Board shall dismiss the exceptions and make the Proposed Order of Unit Clarification 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 to the Proposed Order of Unit Clarification be and the same are hereby dismissed and the Proposed Order of Unit Clarification issued on September 30, 2004, be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this eighteenth day of January, 2005. 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.