

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
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: Case No. PERA-U-04-203-W  
RIVERVIEW INTERMEDIATE UNIT #6 : (PERA-R-3861-W)  
:

**FINAL ORDER**

On November 10, 2005, Riverview Intermediate Unit #6 (Employer) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification issued on October 21, 2005. In the Proposed Order of Unit Clarification, the hearing examiner concluded that the positions of Occupational Therapist, Physical Therapist, and STEP Coordinator were professional within the meaning of Section 301(7) of the Public Employee Relations Act (Act) and shared an identifiable community of interest with the other professional employees of the Employer represented by the Intermediate Unit #6 Education Association, PSEA/NEA (Association) in the unit certified by the Board at Case No. PERA-R-3861-W. On December 5, 2005, the Association filed its response to the Employer's exceptions.

In its exceptions, the Employer contends that the hearing examiner erred in 1) making finding of fact 34<sup>1</sup> in that there was no testimony in the Association's case in chief that supports that finding; 2) denying the Employer's Motion to Dismiss the Association's petition because the Association failed to meet its burden of proof that an identifiable community of interest exists between the petitioned-for employees and the employees in the existing bargaining unit in its case in chief; and 3) finding that a community of interest exists because the Association's case in chief failed to prove anything regarding the employees in the existing bargaining unit; and 4) finding that the Association met its community of interest burden by proving that the petitioned-for employees are professional employees rather than relying on the factors cited in Western Psychiatric Institute v. PLRB, 358 2d. 257 (Pa. Cmwlth. 1974).

The first three exceptions interposed by the Employer involve the alleged failure of the Association to carry what the Employer characterized as its "burden of proof" that a community of interest exists between the petitioned-for employees and the employees in the existing bargaining unit. These exceptions are without merit. The Board has held that the party seeking the inclusion of positions in a bargaining unit must establish an identifiable community of interest between those positions and the positions in the existing unit. Amalgamated Transit Union Local 89 v. PLRB, 493 A.2d 485 (Pa. Cmwlth. 1985). However, the Employer misperceives the nature of a unit clarification proceeding. The Board has long held that representation proceedings, like the unit clarification petition here, are investigatory, not adversarial, in nature and that strict burdens of proof do not apply, but that a petitioner seeking to change the status quo has the burden of persuasion to prove the averments in the petition. Limerick Township, 2 PPER 127 (Order and Notice of Election, 1972); Cambria County, 10 PPER ¶ 10186 (Nisi Decision and Order, 1979); Mifflin County School District, 14 PPER ¶ 14263 (Final Order, 1983); Ambridge Area School District, 25 PPER ¶ 25074 (Proposed Order of Unit Clarification, 1994). The Association complied with its obligation by offering evidence establishing that the petitioned-for employees were professional employees within the meaning of the Act and were appropriately included with the other professional employees of the Employer. The Association thereafter relied upon its cross examination of the Employer's witness to further buttress its case that an identifiable community of interest exists between the petitioned-for employees and the employees in the existing bargaining unit. The Employer

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<sup>1</sup> In its exceptions and supporting brief, the Employer variously refers to "finding of fact 35" and "finding of fact 34." Since there is no finding of fact 35, it is assumed that the Employer is referring to finding of fact 34.

relies upon cases involving charges of unfair practices to support its contention that the hearing examiner erred in not dismissing the Association's petition for its alleged failure to carry its burden of proof. Because those cases involve adversarial and not investigatory proceedings where a complainant does have a burden to prove a prima facie case or run the risk of dismissal, those cases are inapposite. Since this proceeding is investigatory and not adversarial in nature, the hearing examiner correctly refused to dismiss the Association's petition for its alleged failure to carry its burden of proof and further correctly relied upon the testimony that was included in the Employer's case that supports finding of fact 34, that in turn supports the conclusion that an identifiable community of interest exists in this case.

The Employer finally excepts to the hearing examiner's conclusion that the Association established an identifiable community of interest in its case in chief by establishing that the petitioned-for employees are professional employees within the meaning of the Act. Section 301(7) of the Act defines "professional employee" as follows:

"Professional employee" 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 relation to a given period of time.

43 P.S. § 1101.301(7). While the Board need not decide that issue because we have concluded that the hearing examiner could appropriately rely upon the evidence adduced during the Employer's case, the Board notes that by its very nature, this definition addresses the type of work performed and the skills necessary to conclude that a position is professional within the meaning of the Act. The fact that these employees and the employees in the existing bargaining unit are professional employees does speak to the question of whether an identifiable community of interest exists. In Allegheny General Hospital v. PLRB, 322 A.2d 793 (Pa. Cmwlth. 1974), the court stated that in determining whether an identifiable community of interest exists, the Board appropriately takes into consideration a variety of factors including the employees' skills and duties, among others, so the Association's proof that the petitioned-for employees were professional employees tends to support the conclusion that an identifiable community of interest exists. The Employer here does not contend that the positions at issue are not professional as the hearing examiner concluded, but merely argues that the professional status of these employees alone is insufficient to prove that they share a community of interest with the other professional employees of the Employer. Because the hearing examiner did not err in relying on the other factors noted in finding of fact 34 to support the conclusion of the existence of an identifiable community of interest, we will affirm the hearing examiner's decision including these positions in the existing professional unit.

After a thorough review of the exceptions, supporting briefs, and all matters of record, the Board hereby dismisses the exceptions and affirms the Proposed Order of Unit Clarification.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that exceptions filed by the Riverview Intermediate Unit #6 are hereby dismissed, and the Proposed Order of Unit Clarification, be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of August, 2006. 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.