

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 : Case No. PERA-U-05-475-W
PENN HILLS SCHOOL DISTRICT : (PERA-R-7525-W)

PROPOSED ORDER OF UNIT CLARIFICATION

On October 17, 2005, the Penn Hills Educational Support Personnel Association, ESPA/PSEA/NEA (Association or Petitioner) filed a petition for unit clarification with the Pennsylvania Labor Relations Board (Board) seeking to include the position of Assistant Tax Office Supervisor in the unit of white-collar non-professional employes of the Penn Hills School District (District or Respondent) represented by the Association and certified by the Board at PERA-R-7525-W.

On December 2, 2005, the Secretary of the Board issued an order and notice of hearing fixing February 9, 2006, in Pittsburgh as the time and place of hearing. The hearing was continued and held on February 8, 2007.

At that time, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The hearing examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That the Penn Hills School District is a public employer within the meaning of Section 301(1) of the Act. (N.T. 8)
2. That the Penn Hills Educational Support Personnel Association, ESPA/PSEA/NEA is an employe organization within the meaning of Section 301(3) of the Act. (N.T. 8)
3. That the Board certified the Association as the exclusive representative of the white collar non-professional employes of the District at Case No. PERA-R-7525-W. (N.T. 8)
4. That the Association and the District are parties to a collective bargaining agreement governing the terms and conditions of employment for that unit, including those of the position of Tax Office Clerk. (N.T. 11-13, Association Exhibit 1)
5. That in January, 2005, the District prepared and posted a job description for a position titled "Assistant Tax Office Supervisor." (N.T. 11, 13, Association Exhibit 2)
6. That the District filled the position with a person who was not in the bargaining unit, John Shirer. (N.T. 13)
7. That the Tax Office is staffed by five employes: the Tax Office Supervisor, Linda Gallo, the Assistant Tax Office Supervisor, Mr. Shirer; and three bargaining unit Tax Office Clerks. Shirer began his employment with the District in March, 2005 (N.T. 23)
8. That according to Bruce Dakan, the District's Business Manager, the position of Assistant Tax Office Supervisor was created because the Tax Office now collects certain taxes for the Municipality of Penn Hills in addition to collecting School District taxes. (N.T. 73-74)
9. That according to Ms. Linda Gallo, the supervisor, testified, Mr. Shirer does more than the other clerks, primarily because he is the liaison with the Municipality for the taxes collected for the Municipality. That work requires the preparation of special reports and internal auditing for the school district and the Municipality, and the preparation of exoneration reports for the real estate tax for both entities. He answers questions the clerks may have about the Municipality's tax. (N.T. 82)

10. That of the twenty separate duties and responsibilities listed in the Assistant Tax Office Supervisor job description, thirteen are virtually identical to those in the job description for Tax Office Clerk. (N.T. 67, Association Exhibits 2 and 3)

11. That of the seven that are different, only three list any supervisory responsibilities. Paragraphs 14, 15 and 16 call for the Assistant Tax Office Supervisor to interview, evaluate and establish work schedules. (N.T. 11, 53, Association Exhibit 2)

12. That Mr. Shirer approved leave only once, due to Ms. Gallo's absence. He did so reluctantly. He testified that it would have been better to wait for the supervisor to approve the leave. (N.T. 98-100, 101-102)

13. That the job description of the actual supervisor omits any reference to evaluating employees. There is no formal evaluation of bargaining unit employees. Mr. Shirer has not performed such a function. (N.T. 70, Association Exhibit 4).

DISCUSSION

The Association has petitioned the Board to include the position of Assistant Tax Office Supervisor in the bargaining unit of white collar non-professional employees.

As the petitioning party, the Association bears the burden of showing that the positions at issue share an identifiable community of interest with the positions in the unit. Amalgamated Transit Union, Local 89 v PLRB, 493 A.2d 485, (Pa. Cmwlth. 1985). In determining whether an identifiable community of interest exists, the Board takes into consideration a variety of factors including the employees' skills, duties, areas of work, working conditions, interchange of employees, supervision, grievance procedure, hours of work, trade requirements, pay scales and employee desires. Allegheny General Hospital v. PLRB, 322 A.2d 793 (Pa. Cmwlth. 1974). A later case stated that such factors as the type of work performed, educational and skill requirements, benefits and bargaining history would also be considered by the Board in deciding if there was an identifiable community of interest. State System of Higher Education, 757 A.2d 442, at 447 (Pa. Cmwlth. 2000), appeal denied, 565 Pa. 659, 771 A.2d 1293 (2001). However, an identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, conditions of employment and other factors. Western Psychiatric Institute v PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974); In the Matter of the Employees of Intermediate Unit 1, 35 PPER ¶ 1 (Proposed Order of Unit Clarification, 2004).

The Association has satisfied its burden of proving that an identifiable community of interest exists between the Assistant Tax Office Supervisor and the other members of the bargaining unit. Although the Assistant Tax Office Supervisor performs some duties that are different from that performed by the other clerks, that factor alone does not remove the community of interest. Western Psychiatric Institute v PLRB, supra. There are substantial similarities between the position and the other positions in the unit in terms of skills, hours of work and chain of supervision.

The District asserts that the position should be excluded from the unit as a supervisor under Section 301 (6) of the Act. As the party seeking to exclude the position, the District bears the burden of proving the factual elements to meet the statutory exclusion. State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999); Danville Area School District, 8 PPER 195 (Order and Notice of Election, 1977).

A supervisor is defined in Section 301(6) of the Act, as follows,

"...any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."

43 P.S. 1101.301(6).

Mr. Shirer's position title includes the word "supervisor" in it. But in deciding whether an employe is a supervisor under Section 301(6) of the Act, the Board looks at the duties the employe actually performs, not at the title of the position. Albert Einstein Medical Center v. PLRB, 330 A.2d 264 (Pa. Cmwlth. 1975)

The District argues that because Mr. Shirer's position involves different and more complex duties than those performed by the other tax office clerks the position should be excluded as a supervisor. Ms. Linda Gallo, the supervisor, testified that Mr. Shirer's work is driven by the new revenue coming into the Municipality of Penn Hills from the newly enacted Emergency and Municipal Services Tax. He generates and reviews a monthly reconciliation balancing report regarding collections made for the Municipality. He also generates a real estate exoneration report which requires daily verification. He is also the Tax Office's liaison with the Municipality and answers questions the other clerks may have regarding the municipal tax. However, it is not the complexity of the job but the actual exercise of supervisory duties over other employes that qualifies an employe as a supervisor. Columbia-Snyder-Montour-Union Mental Health-Mental Retardation Program v. Commonwealth, 383 A.2d 546 (Pa. Cmwlth. 1978), Cumberland County, 12 PPER ¶ 12198 (Proposed Decision and Order, 1981), 13 PPER ¶ 13035 (Final Order, 1982).

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983).

The District contends that Mr. Shirer has the authority to conduct hiring interviews for new employes. However, there has been no occasion during Mr. Shirer's tenure on the job to interview any potential employes. The one employe who received a job in the office, Monica Lassiter, moved into the position by virtue of the collective bargaining agreement. Accordingly, since there is no evidence that Mr. Shirer exercised hiring authority, that factor will not be given weight.

The District contends that Mr. Shirer evaluates employes, that he approves leave and that he directs employes. The District contends that these duties meet the definition of a supervisor.

As a prelude to discussing these arguments, it is necessary to keep in mind the admonition of Section 604(5) of PERA, which provides that the Board, in making supervisory determinations, "may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employes who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 462 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 568 Pa. 675; 795 A.2d 984 (2000); State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532, 532 (Pa. Cmwlth. 1980). Conversely, where the employe performs predominantly supervisory duties, that employe is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975).

Mr. Shirer participated in a meeting called to discuss an employe's performance. The executing of performance evaluations can lead to the finding of supervisory status, as long as the evaluations are given controlling weight and normally result in either reward or discipline. State System of Higher Education, 29 PPER 29234 (Final Order, 1998), aff'd, State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999). However, Mr. Shirer's participation in a meeting did not rise to the level of evaluating an employe that the law requires to establish supervisory status.

As for the granting of leave as a factor to qualify Mr. Shirer as a supervisor, the record reveals that Mr. Shirer approved leave on one occasion. However, employes are not supervisors if they only exercise supervisory authority on occasion. Williamsport-Lycoming Recreation Authority (White Deer Golf Course), 9 PPER ¶ 9195 (1978) or when their supervisor is occasionally absent. Child Development Council of Centre County, 10 PPER ¶ 10276 (1979). In Luzerne County Community College, 37 PPER ¶ 47 (Final Order,

2006), the Board concluded that authority for the granting of leave held by the Director of the Hazelton Branch of the College and the Director of Financial Aid would not suffice to exclude the positions as supervisory. The Board reasoned that their authority in the granting of leave, standing alone, was not enough to overcome the admonition of Section 604(5) of the Act to take into account the extent to which the position performed supervisory and non-supervisory duties. Accordingly, in this instance, the one time granting of leave is not a factor to assist the District in carrying its burden of proof.

Finally, the District contends that Mr. Shirer is a supervisor because he directs the work of the other clerks. It does not appear that the clerks need that much direction. The three clerks have been there for six years, two years and two months, respectively. Ms. Gallo testified that they work well together and do not require much in the way of direction. On occasions when Ms. Gallo is not present, Mr. Shirer has the authority to direct the clerks' work. As has been stated, the Board does not recognize the occasional performance of supervisory duties sufficient to deem an employe a supervisor under the Act. Williamsport-Lycoming Recreation Authority, supra.

In conclusion, the District has not carried its burden of proving the Assistant Tax Office Supervisor meets the statutory criteria for exclusion as supervisory as that term has been interpreted by the Board and the courts. The Association's petition to include the position in the nonprofessional bargaining unit is granted.

CONCLUSIONS

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That the Penn Hills School District is a public employer within the meaning of Section 301(1) of the Act.
2. That the Penn Hills Educational Support Personnel Association ESPA/PSEA/NEA is an employe organization within the meaning of Section 301(3) of the Act.
3. That the Board has jurisdiction over the parties.
4. That the position of Assistant Tax Office Supervisor shares a community of interest with the employes in the nonprofessional bargaining unit certified by the Board at PERA-R-7525-W.
5. That the position of Assistant Tax Office Supervisor is not a supervisor within the meaning of Section 301(6) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the unit is amended to include the position of Assistant Tax Office Supervisor.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED and MAILED from Harrisburg, Pennsylvania, this seventeenth day of December, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner