

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-07-443-E
 : (PERA-R-05-338-E)
DUNMORE BOROUGH :

PROPOSED ORDER OF UNIT CLARIFICATION

On October 24, 2007, Dunmore Borough (Borough or Petitioner) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board), seeking clarification of a unit of white collar non professional employes represented by the United Food and Commercial Workers, Local 1776 (Union or Respondent) to exclude the position of administrative assistant to the Borough Manager as a confidential employe.

On January 10, 2008, the Secretary of the Board issued an Order and Notice of Hearing in which February 14, 2008, was assigned as the time and place of a telephone pre-hearing conference to resolve the matters in dispute without a hearing and March 6, 2008, in Scranton was assigned as the time and place of hearing, if necessary.

The hearing was necessary, but the date of the hearing was continued to May 8, 2008, at which time all parties in interest were afforded a full opportunity to present testimony, cross examine witnesses and introduce documentary evidence.

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

FINDINGS OF FACT

1. That Dunmore Borough is a public employer as defined in Section 301(1) of the Public Employe Relations Act (PERA). (N.T. 5, Board Exhibit 1)
2. That United Food and Commercial Workers, Local 1776 is an employe organization as defined in Section 301(3) of PERA. (N.T. 5, Board Exhibit 1)
3. That in 2005, the Board certified the union as the exclusive representative for the purpose of collective bargaining with respect to wages, hours and other terms and conditions of employment of a unit described as "All full-time and regular part-time white-collar, nonprofessional employes including but not limited to secretaries, clerks, office employees and code enforcement and building inspection officer; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act." (N.T. 5, Board Exhibit 1, PERA-R-05-338-E)
4. That there are seven employes in the clerical unit described in Finding of Fact Number 3. (N.T. 13, 51)
5. That altogether, the Borough employes approximately 70 full-time individuals who are in collective bargaining units. Additionally, the Borough employs approximately 70 part-time employes and school crossing guards who are not in collective bargaining units. (N.T. 13-14)
6. That there are four bargaining units representing Borough employes with separate collective bargaining agreements for each. In addition to the clerical union in the present case, the Department of Public Works employes are represented by UFCW 1776; the firefighters are represented by International Association of Fire Fighters, Local 860, and the police are represented by the Fraternal Order of Police. (N.T. 13)
7. That the parties stipulated and agreed that other than the Borough Manager, there are no Borough employes in the clerical unit or any other unit who are deemed confidential within the meaning of Section 301 (13) of PERA. (N.T. 46-47)

8. The position of administrative assistant is in the clerical bargaining unit represented by UFCW 1776. (N.T. 21, 50-51)

9. That on October 24, 2007, the date the union filed this petition, the administrative assistant was Maryann Mistycyn. (N.T. 19, 64)

10. That after this petition was filed, the Borough transferred Ms. Mistycyn to codes enforcement officer and hired Catherine Beckage for the position. Beckage began work on November 13, 2007. (N.T. 6, 10, 48-49)

11. That the Borough Manager is Joseph W. Loftus. He is also director of the Borough's community center, the director of the Borough's department of public works and the acting director of public safety. (N.T. 12)

12. That Mr. Loftus became Borough Manager in 2004. (N.T. 64)

13. That when Mr. Loftus became Manager, his administrative assistant was Cheryl Conway, who remained in that position until 2005, when she was transferred to another position and replaced by Ms. Mistycyn. (N.T. 17)

14. That as part of his duties, Mr. Loftus has been responsible for negotiating collective bargaining agreements with all four bargaining units, including UFCW 1776. (N.T. 15-16)

15. That in negotiating the police and firefighter collective bargaining agreements, Mr. Loftus has developed issues in dispute that were submitted to the Act 111 arbitration panels for those units. (N.T. 16-17)

16. That Mr. Loftus prepared for and helped the Borough present its case to the Act 111 interest arbitration panels. (N.T. 16-17)

17. That the personnel records of the Borough are kept in Borough Manager Loftus' office. (N.T. 19)

18. That Ms. Mistycyn had access to Mr. Loftus' office. (N.T. 19, 63-64)

19. That Ms. Mistycyn had access to and copied the Borough's collective bargaining proposals before they were presented to the unions. She distributed the proposals to the unions. (N.T. 44, 45)

20. That Ms. Mistycyn sat on the union side during the negotiations between the union and the Borough for the latest collective bargaining agreement. (N.T. 50, 51-52)

21. That Ms. Mistycyn's office was outside Mr. Loftus' office. She shared it with two other clerical employes, Denise Maraco and Cheryl Conway. (N.T. 36-37, 50)

DISCUSSION

The Borough's petition for unit clarification seeks to exclude the position of administrative assistant to the Borough Manager as a confidential employe within the meaning of Section 301(13) of PERA.

As the petitioner, the Borough has the burden of proving the factual elements to meet the basis for 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).

At Section 301(13) of PERA is the definition of confidential employe:

"Confidential employe" shall mean any employe who works (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii)

in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer."

43 P.S. 1101.301(13)

Initially, it must be noted that the Union objected to evidence of the job duties performed by Catherine Beckage, the incumbent in the position, on the grounds that Ms. Beckage began her employment after the petition was filed. The Board cannot consider post-petition job duties in judging the merits of a unit clarification petition. North Hills School District v. PLRB, 722 A. 2d 1155 (Pa. Cmwlth. 1999). "This policy is designed to deter an employer from assigning activities to an employee after a petition is filed simply to create the appearance that the employee should be excluded from the unit." Elizabeth Township, 33 PPER ¶ 33053 (Final Order, 2002). Accordingly, the only relevant testimony is that relating to persons who held the position on or before October 24, 2007, the date of the filing of the unit clarification petition.

The relevant evidence was testimony from Manager Joseph Loftus for the Borough and Maryann Mistycyn for the union. Their testimony must be evaluated against the statutory definition of confidential employe in Section 301(13) of PERA and the Commonwealth Court's interpretation of that statute as set forth in North Hills School District v. PLRB, 762 A.2d 1153 (Pa. Cmwlth. 2000). In North Hills School District, the court held that there need not be a showing that an employe was actually privy to the employer's collective bargaining strategy in order for the employe to be found to be confidential under the Supreme Court's construction of Section 301(13)(ii) of PERA in Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978). As the court explained, Section 301(13)(ii) of the Act "appears to assume that [an] employe [working in a close continuing relationship with a representative associated with collective bargaining on behalf of the employer] would have access to confidential information, so that their 'inclusion in the bargaining unit would seriously impair the public employer's ability to bargain on a fair and equitable footing with the union. ' [Altoona Area School District, supra, 480 Pa.] at 155, 389 A.2d at 557." 762 A.2d at 1159.

After considering the relevant testimony, it must be concluded that the Borough has sustained its burden of proving the administrative assistant is a confidential employe within the meaning of Section 301(13)(ii) of PERA. Borough Manager Loftus testified that he has been responsible for negotiating four collective bargaining agreements with the unions representing the Borough's employes. Thus, he is a "representative associated with collective bargaining on behalf of the employer." Mr. Loftus also testified that Ms. Misycyn had access to collective bargaining proposals before they were distributed to the unions, including her own union. He testified that Ms. Mistycyn made copies of the Borough's proposals before she distributed them to the union.

Ms. Mistycyn testified that Manager Loftus' did not give her many of the work assignments he said he gave her. However, she did not rebut his testimony that he assigned to her the duties of copying bargaining proposals and distributing them to the unions. It is uncontested that other than the Borough Manager, the Borough has no confidential employes among the 140 full-time and part-time employes in the Borough's work force. Mr. Loftus has no one else to assist him when he needs a confidential employe for collective bargaining negotiations. Meanwhile, it is uncontested that Ms. Mistycyn has been on the union negotiating team during negotiations for the clerical unit, a situation that does not enable the employer to bargain on a fair and equitable footing with the union. Accordingly, given this record, the conclusion that must be reached is that the administrative assistant to the Borough Manager is a confidential employe.

CONCLUSIONS

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

1. That Dunmore Borough is a public employer within the meaning of Section 301(1) of PERA.

2. That the United Food and Commercial Workers, Local 1776, is an employe organization within the meaning of the Section 301(3) of the PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the administrative assistant to the Borough Manager is a confidential employe under Section 301(13) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the unit certified by the Board at PERA-R-05-338-E is amended to exclude the position of administrative assistant to the Borough manager.

IT IS HEREBY ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this eighth day of October, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner