COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| IN THE MATTER OF THE EMPLOYES OF | : | |
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| | : | Case No. PERA-U-08-246-W |
| | : | (Case No. PERA-R-2748-W) |
| | : | |
| CLAIRTON CITY SCHOOL DISTRICT | : | |

**PROPOSED ORDER OF UNIT CLARIFICATION**

On June 30, 2008, the Clairton City School District (District) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification to exclude the secretary to the assistant superintendent from a bargaining unit comprised of the District's secretaries who are represented by the Clairton Secretarial Association/PSEA/NEA (Association). On July 17, 2008, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on September 2, 2008, if the parties were unable to agree on the matters raised in the petition by then. On August 25, 2008, the hearing examiner, upon the request of the Association and without objection by the District, continued the hearing. On October 3, 2008, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On January 20, 2009, each party filed a brief by deposit in the U.S. Mail.

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

FINDINGS OF FACT

1. On October 1, 1990, the Board certified the Association as the exclusive representative of a bargaining unit that includes secretaries employed by the District. Confidential employes are excluded from the bargaining unit. (Case Nos. PERA-U-90-406-W, PERA-U-81-449-W and PERA-R-2748-W)

2. In the late 1990's, the District's then acting superintendent (Dr. John Ogurchak) began working as its assistant superintendent, and its then federal programs secretary (Gayle Colonna) began working as his only secretary. (N.T. 10-11, 26-27, 49, 52, 62-63, 75)

3. In the Spring of 2007, during negotiations by the District and the exclusive representative of its teachers for their current collective bargaining agreement, Dr. Ogurchak presented the District's proposals at the bargaining table. (N.T. 14-15, 18, 27, 34, 47, 50, 80; District Exhibits 1-3)

4. In June or July of 2007, during negotiations by the parties for their current collective bargaining agreement, Dr. Ogurchak at the direction of the District's board of directors prepared proposals for the District's then superintendent (Dr. Robert David) to present at the bargaining table. (N.T. 11-12, 15, 20-21, 25, 27-31, 44-45, 47, 100-101; District Exhibit 4)

5. In May 2007, the District hired a second assistant superintendent (Dr. Lucille Abellonio). (N.T. 48, 78, 81-82)

6. In November 2007, Dr. Ogurchak retired, and Ms. Colonna began working for Dr. Abellonio. (N.T. 10, 15, 52, 86-87)

7. In February 2008, the parties concluded the negotiations for their current collective bargaining agreement, and Dr. Abellonio was present for the final read through of the agreement. She was not otherwise involved in the negotiations for the agreement. (N.T. 55-56, 78-79, 82, 86-89, 102-103, 112)

8. In May 2008, the District hired Dr. Abellonio as its superintendent. (N.T. 12, 48, 81)

9. In July 2008, the District hired Dr. Elisabeth Ehrlich as its assistant superintendent. Ms. Colonna works for her and Dr. Abellonio. Dr. Ehrlich has had no labor policy role to date. (N.T. 12, 48, 77, 83)

10. The superintendent's secretary is the only employe currently excluded from the bargaining unit as confidential. Nine other secretaries are currently included in the bargaining unit. Ms. Collona is one of the nine. (N.T. 65-66, 86, 89-90)

DISCUSSION

The District has petitioned to clarify a bargaining unit that includes all of its secretaries except the secretary to the superintendent, who is excluded from the bargaining unit as a confidential employe. The District contends that the secretary to the assistant superintendent should be excluded from the bargaining unit as well because she is a confidential employe, too. According to the District, the secretary to the assistant superintendent meets the definition of confidential employe under section 301(13)(ii) of the Public Employe Relations Act (PERA), which provides as follows:

> "'Confidential employe' shall mean any employe who works . . . in a close continuing relationship with . . . representatives associated with collective bargaining on behalf of the employer."

43 P.S. § 1101.301(13)(ii).

The Association contends that the petition should be dismissed for lack of proof that the secretary to the assistant superintendent is a confidential employe. The Association alternatively contends that the petition should be dismissed because the District has no need for a second confidential secretary.

The first question to be decided is whether or not the secretary to the assistant superintendent is a confidential employe under section 301(13)(ii).

In PLRB v. Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978), our Supreme Court held that section 301(13)(ii) is to be narrowly construed. As the Court explained:

> "The PERA was enacted to accord public employes the right to organize and bargain with their employers, 43 P.S. § 1101.101. This right, whether it be in the public or private sector, is 'the very essence of any viable labor relations system.' Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 Duq.L.Rev. 357, 365 (1972). Since § 1101.301(13) denies to certain employes this fundamental right, the Board could properly determine that 'associated with' was best read so as to exclude only those employes whose inclusion in the bargaining unit would seriously impair the public employer's ability to bargain on a fair and equal footing with the union. It was not the purpose of § 1101.301(13)(ii) to exclude every employe even remotely 'associated with' collective bargaining, from the janitorial employes who clean up after negotiation sessions to the employes who keep the negotiators supplied with coffee, drinking water and sharpened pencils. To the contrary, when we consider the purpose of the PERA, it becomes clear that the section is far more amenable to the interpretation given it by the Board -- limiting the exclusion to those employe[]s who work in a close continual relationship with managerial employes who actually formulate, determine or effectuate the employer's labor policy."

480 Pa. at 155-156, 389 A.2d at 557.

The record shows that the secretary to the assistant superintendent is the assistant superintendent's only secretary (finding of fact 2). The record also shows that the assistant superintendent presented the District's proposals during negotiations for its current collective bargaining agreement with the exclusive representative of its

teachers (finding of fact 3) and prepared at the direction of its board of directors proposals for its then superintendent to present during negotiations for its current collective bargaining agreement with the Association (finding of fact 4).

On a substantially similar record in North Hills School District v. PLRB, 762 A.2d 1153 (Pa. Cmwlth 2000), petition for allowance of appeal denied, 566 Pa. 653, 781 A.2d 150 (2001) (North Hills II), our Commonwealth Court held that a secretary to an assistant superintendent worked in a close continuing relationship with a representative associated with collective bargaining on behalf of the employer and thus was a confidential employe under section 301(13)(ii). In that case, the record showed that the secretary was the assistant superintendent's only secretary and that the assistant superintendent participated in negotiations as a member of the employer's bargaining team.

On a substantially similar record in Westmont Hilltop School District, 33 PPER ¶ 33067 (Final Order 2002), the Board likewise found that a secretary/payroll clerk worked in a close continuing relationship with a representative associated with collective bargaining on behalf of the employer and thus was a confidential employe under section 301(13)(ii). In that case, the record showed that the secretary/payroll clerk worked for a business manager who was a member of the employer's bargaining team and who prepared proposals that the employer presented at the bargaining table.

Given that the secretary to the assistant superintendent is the assistant superintendent's only secretary, that the assistant superintendent presented the District's proposals during negotiations for its current collective bargaining agreement with the exclusive representative of its teachers and that the assistant superintendent prepared at the direction of its board of directors proposals for its then superintendent to present during negotiations for its current collective bargaining agreement with the Association, it is apparent that she also works in a close continuing relationship with a representative associated with collective bargaining on behalf of the employer and thus is a confidential employe under section 301(13)(ii).

In support of its contention that the secretary to the assistant superintendent is not a confidential employe, the Association points out that the current assistant superintendent (Dr. Ehrlich) has had no labor policy role to date (finding of fact 9), that Dr. Ehrlich's immediate predecessor as assistant superintendent (Dr. Abellonio) had a limited labor policy role (finding of fact 7) and that Dr. Abellonio's immediate predecessor as assistant superintendent (Dr. Ogurchak) never appeared at the bargaining table during the parties' negotiations for their current collective bargaining agreement (N.T. 30, 47).

In cases where the current occupant of a position has a limited work history, however, the Board looks to the track record of the prior occupant or occupants of the position in order to determine the status of the position. Lower Providence Township, 16 PPER ¶ 16117 at n. 1 (Final Order 1985); Blairsville-Saltsburg School District, 32 PPER ¶ 32025 (Proposed Order of Unit Clarification 2000). Thus, in and of itself, the fact that Dr. Ehrlich's association with collective bargaining on behalf of the District has been non-existent since she became the assistant superintendent is irrelevant, as is the fact that Dr. Abellonio's association with collective bargaining on behalf of the District was limited when she was the assistant superintendent.

In and of itself, the fact that Dr. Ogurchak did not appear at the bargaining table during the negotiations leading up to the parties' current collective bargaining agreement is equally irrelevant. In City of Monessen, 15 PPER ¶ 15163 (Final Order 1984), the Board found that a police chief formulated, determined or effectuated the employer's labor policy within the meaning of Altoona Area School District, supra, even though there was no showing that he ever appeared at the bargaining table. Thus, an employe may be found to be associated with collective bargaining on behalf of the employer as set forth in section 301(13)(ii) without ever having appeared at the bargaining table. Moreover, although Dr. Ogurchak did not appear at the bargaining table during the negotiations leading up to the parties' current collective bargaining agreement, the fact remains that he presented the District's proposals at the bargaining table during the negotiations leading up to its current collective bargaining agreement with the exclusive representative of its teachers (finding of fact 3).

In further support of its contention that the secretary to the assistant superintendent is not a confidential employe, the Association submits that District Exhibits 1-4 are entitled to no weight because they contain documents that do not indicate who prepared them or for whom they were prepared and/or because they contain documents that are undated. The Association points out that in Wilmington Area School District, 24 PPER ¶ 24075 (Proposed Order of Unit Clarification 1993), a hearing examiner wrote that "the Board must be suspect of evidence generated after the filing of petitions which raise issues as to the inclusion or exclusion of unit positions." 24 PPER at 191. See also North Hills School District v. PLRB, 722 A. 2d 1155 (Pa. Cmwlth. 1999) (North Hills I), where the Court held that the Board cannot consider post-petition job duties in judging the merits of a unit clarification petition.

The Association also submits that contract language and salary proposals contained in District Exhibits 1-4 are entitled to no weight because the District gave them to the Association shortly after the assistant superintendent prepared them and his secretary typed them up (N.T. 35-37). According to the Association, there is no basis for finding that the secretary to the assistant superintendent actually had access to confidential information under the circumstances. The Association points out that the hearing examiner in Wilmington Area School District found a secretary to a board secretary/business manager not to be a confidential employe, explaining that documents she had access to were not confidential because they contained information that was available to the exclusive representative at the time of their preparation.

To the extent that District Exhibits 1-4 contain contract language and salary proposals that were prepared by the assistant superintendent before the petition was filed on June 30, 2008, however, they provide an evidentiary basis for finding that the assistant superintendent was associated with collective bargaining on behalf of the District. In this regard, a close review of the record as a whole reveals that the contract language and salary proposals contained in District Exhibits 1-4 were prepared by the assistant superintendent during negotiations in 2007 (N.T. 12-15, 18, 34). The hearing examiner has relied upon the contract language and salary proposals contained in District Exhibits 1-4 accordingly.

The hearing examiner otherwise has not relied on District Exhibits 1-4. The same result as in Wilmington Area School District, supra, does not obtain, however, because that case was decided before North Hills II, supra, and is no longer good law to the extent that it provides that an employe actually must have had access to confidential material in order to be confidential under section 301(13)(ii).

In North Hills II, the court held that an employe may be confidential under section 301(1)(ii) even without a showing that the employe actually had access to confidential material. As the Court explained:

> "Further, as Santillo's only secretary, Dougherty clearly has a close continuing relationship with Santillo and, thus, appears to have fully satisfied the PERA's ***second*** definition of a confidential employee. The PLRB determines otherwise based on the School District's failure to present copies of the memoranda or specific testimony as to their content. However, the School District did not need to present such evidence to meet its burden ***under section 301(13)(ii)*** of the PERA."

762 A.2d at 1158-1159 (emphasis in original). As the Court further explained:

> "Where an employee has a close relationship with such involved management personnel, the PERA appears to assume that that employee 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 equal footing with the union.' [PLRB v. Altoona Area School District, 480 Pa.] at 155, 389 A.2d at 557."

Id. at 1159 (footnote omitted). Thus, under the current state of the law, the secretary to the assistant superintendent may be found to be a confidential employe under section 301 (13)(ii) even if she did not actually have access to confidential material when she typed up the contract language and salary proposals contained in District Exhibits 1-4.

The second question to be decided is whether or not the District has a need for a second confidential employe.

In Cheltenham School District, 32 PPER ¶ 32098 (Final Order 2001), the Board, in keeping with the Court's holding in Altoona Area School District, supra, that section 301(13)(ii) is to be narrowly construed, explained that it will "prohibit employers from distributing confidential duties among various employes to gain confidential exclusions for more employes than are necessary for an employer to conduct its collective bargaining." 32 PPER at 254. See also Reynolds School District, 22 PPER ¶ 22098 (Final Order 1991)(same).

In Westmont Hilltop School District, supra, the Board explained that the focus in deciding whether or not an employer has distributed confidential work to more employes than are necessary for it to conduct its collective bargaining is on whether or not it has assigned the work consistent with the functions of the employes involved.

As noted above, the record shows that the secretary to the assistant superintendent is the assistant superintendent's only secretary. The record also shows that the District's only other confidential employe is the secretary to its superintendent (finding of fact 10).

On a substantially similar record in Westmont Hilltop School District, the Board found that the employer had not distributed confidential work to more employes than were necessary for it to conduct its collective bargaining In that case, the record showed that consistent with the functions of the employes involved the employer assigned confidential work to a secretary/ payroll clerk who worked for a business manager for whom a confidential employe already worked. As the Board explained:

> "The hearing examiner correctly noted that this is not a case where the employer is merely dividing the same work among different individuals in order to exclude more positions from the bargaining unit. Rather, this is a case where the Employer is assigning job duties consistent with the different functions performed by the Business Manager's secretary and the secretary/payroll clerk. Fairview School District, 8 PPER 358 (Nisi Decision and Order, 1977). In such circumstances, the fact that the Business Manager already has a confidential employe working for him does not preclude the finding that an additional employe in the same office is confidential."

33 PPER at 140. Notably, in Fairview School District, the Board found that a payroll clerk was a confidential employe even though the employer already had a confidential employe. As the Board explained:

> "At present, the only confidential employe is the Executive Secretary who performs services for the Superintendent, Assistant Superintendent and the Controller in his multi-faceted position. It could not be unreasonable, under the facts of this case, that a clerk position is necessary in the role of a Section 310(13) confidential employe."

8 PPER at 360.

On a substantially similar record in Penn Hills School District, 39 PPER 64 (Proposed Order of Dismissal 2008), Hearing Examiner Thomas P. Leonard, citing Westmont Hilltop School District, found that an employer had not distributed confidential work to more employes than were necessary for it to conduct its collective bargaining when it assigned confidential work to a payroll clerk working for its business manager even though the business manager already had a confidential secretary working for him and even though its superintendent and its assistant superintendent each already had confidential secretaries working for them. In that case, the record showed that the employer assigned the confidential work to the payroll clerk consistent with the payroll clerk's functions.

On a substantially similar record in Warren County School District, 34 PPER 77 (Proposed Order of Unit Clarification 2003), the hearing examiner, citing Westmont

Hilltop School District, found that an employer had not distributed confidential work to more employes than were necessary for it to conduct its collective bargaining when it assigned confidential work to the only secretary to its director of buildings and grounds even though confidential secretaries worked for a number of its other representatives associated with collective bargaining on its behalf. In that case, the record showed that the employer assigned the confidential work to the secretary consistent with the secretary's functions.

Given that there is no other secretary working for the assistant superintendent, it is apparent that the District similarly assigned her confidential work consistent with her functions. Thus, the same result as in Westmont Hilltop School District, Fairview School District, Penn Hills School District and Warren County School District must obtain.

In support of its contention that the petition should be dismissed because the District has no need for a second confidential secretary, the Association submits that the other confidential employe (the secretary to the superintendent) "is fully capable of performing all necessary functions related to bargaining and any other confidential labor policy matters." Brief at 9-10. The Association also points out that the District only has ten secretaries.

The record does not show, however, that the secretary to the superintendent "is fully capable of performing all necessary functions related to bargaining and any other confidential labor policy matters." Moreover, as noted above, under the analysis set forth in Westmont Hilltop School District, the focus in deciding whether or not the District has distributed confidential work to more employes than are necessary for it to conduct its collective bargaining is on whether or not it has assigned work consistent with the functions of the employes involved. Thus, in and of itself, the number of secretaries employed by the District is irrelevant in deciding whether or not it has a need for a second confidential employe.

Although it does not argue the point in its brief, the Association notes that the District did not propose that the secretary to the assistant superintendent be excluded from the bargaining unit until after the parties concluded the negotiations for their current collective bargaining agreement (N.T. 45-46, 106). An argument not presented to a hearing examiner is, of course, waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). In any event, the Board has jurisdiction to clarify a bargaining unit notwithstanding what the parties may or may not have agreed to in collective bargaining. Chambersburg Area School District, 22 PPER ¶ 22149 (Final Order 1989). Thus, the petition is properly before the Board.

## CONCLUSIONS

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

1. The District is a public employer under section 301(1) of the PERA.

2. The Association is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The secretary to the assistant superintendent is a confidential employe under section 301(13)(ii) of the PERA.

## ORDER

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

## HEREBY ORDERS AND DIRECTS

that the secretary to the assistant superintendent is excluded from the bargaining unit.

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 thirteenth day of February 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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DONALD A. WALLACE, Hearing Examiner