

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
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:  
Case No. PERA-U-08-366-E  
:  
(PERA-R-2741-C)  
:  
NORTHERN TIOGA SCHOOL DISTRICT :

**PROPOSED ORDER OF UNIT CLARIFICATION**

On September 18, 2008, the Northern Tioga Educational Support Personnel Association (Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification (Petition) seeking to include head cooks, head custodians and home and school visitors in the nonprofessional unit at the Northern Tioga School District (District). On October 8, 2008, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on November 13, 2008. The hearing was held on that date in Williamsport, Pennsylvania, during which the Union and the District were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

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

**FINDINGS OF FACT**

1. The District is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act (PERA). (N.T. 8).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8).
3. The parties stipulated and agreed that the positions of home and school visitors are to be included in the bargaining unit. (N.T. 8-9).
4. The status of the position of head custodian was previously litigated before the Board. The Board made findings of fact and issued an order concluding that the job duties of the position of head custodian satisfied the statutory definition of supervisor and excluded that position from the bargaining unit. (In the Matter of the Employes of Northern Tioga Sch. Dist., 3 PPER 107 (Order and Notice of Election, April 18, 1973)).
5. The District and the Union's predecessor<sup>1</sup> stipulated and agreed in 1973 that the position of head cook was that of a supervisor as defined in PERA. The Board has not previously adjudicated the status of the position of head cook based on actual job duties. (In the Matter of the Employes of Northern Tioga Sch. Dist., 3 PPER 107, 108 ff.14 (Order and Notice of Election, April 18, 1973)).
6. Roderick Butler is the head custodian at Elkland High School. Mr. Butler schedules work for night custodians, orders supplies, approves leave, selects candidates for interviews, participates in the hiring of custodians and he has unsupervised control over expenditures within the custodial budget; he also transfers and assigns subordinate custodians between Elkland High School and Clark Wood Elementary School. Mr. Butler spends up to one-and-one-half hours of his eight-hour shift doing administrative work. Mr. Butler approves vacations and sick leave. The District does not require the approval of a building principal to give a day off to a custodian. He has received supervisor training from the District. (N.T. 49-60, 119).
7. Head cooks are the first step in the grievance procedure under the parties' collective bargaining agreement. (N.T. 26, 30; Joint Exhibit 1).

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<sup>1</sup> On June 8, 2006, the Board issued a Nisi Order of Amended Certification changing the name of the certified exclusive bargaining representative with the approval of a majority vote of the members.

8. The head cook at Elkland High School is Mary Theresa Miller. Ms. Miller has a separate office with a desk, computer, telephone, calculator and a separate table. Ms. Miller is responsible for ordering food; she directs employes and assigns specific, individual tasks depending on the needs of the day or the week; she establishes employe schedules; and she completes state required production records. (N.T. 26, 30, 34-35, 37-38 44, 93-94, 96-97; District Exhibit 14).

9. Ms. Miller does not and is not required to obtain approval for the schedules she gives to employes or the work assignments she directs individual employes to perform. Ms. Miller has the authority to and does transfer employes to different positions. (N.T. 93-94, 98; District Exhibit 14).

10. Ms. Miller recommended that discipline be imposed upon a cashier in the cafeteria after the cashier refused to comply with Ms. Miller's repeated directives not to permit students to cause a negative account balance by purchasing more food than they have money for in their accounts. Ms. Miller's supervisor followed the recommendation and wrote up the reprimand. Ms. Miller, thereafter, brought the cashier into her own office, verbally reprimanded her and directed the cashier to sign the reprimand. (N.T. 39-40, 102-104; District Exhibit 17).

11. On April 4, 2002, Ms. Miller, without approval, verbally reprimanded another cafeteria employe for publicly confronting a cashier in the cafeteria. This reprimand warned of future progressive discipline for failure to comply with the procedures delineated in the reprimand. (102-104; District Exhibit 16).

12. On or about May 19, 2006, Ms. Miller verbally reprimanded four employes for intentionally failing to follow the District's Replacement Meals policy. The Replacement Meals Policy allows the cafeteria to provide only a peanut butter and jelly sandwich, fresh fruit and milk to a child that comes into school with no lunch or lunch money after three days. The four reprimanded cafeteria workers were giving the students receiving Replacement Meals a full lunch with extras in addition to the peanut butter and jelly sandwich. (N.T. 105-110; District Exhibit 18).

13. Ms. Miller is involved in hiring and selecting new employes in the cafeteria. She selects the individuals for interviews and she is present as a panel member conducting the interviews. The interview process involves a scoring system whereby each panel member assigns and submits a score in number form. Each panel member's score is given equal weight. She is one of three to five individuals on the interview panel. One time the District did not hire someone who Ms. Miller wanted, but Ms. Miller was not involved in the hiring process for that candidate because she was away. The District has always hired the person recommended by Ms. Miller when Ms. Miller was involved in the hiring process. Following an employe's forty-five-day probationary period, Ms. Miller completes a performance evaluation and recommends whether to hire that person. Ms. Miller also completes performance evaluations for each of her eleven employes at the end of each school year. (N.T. 41-43, 90-93, 111; District Exhibit 13).

14. After reviewing cafeteria personnel files for prospective candidates to fill a full-time cafeteria position, the principal at Elkland and the District Superintendent opposed interviewing a substitute cafeteria worker, by the name of J.B., for the position. Ms. Miller contacted the food service director and expressed her desire to have J.B. interviewed. Based on Ms. Miller's recommendation, the District administration agreed to interview J.B. Ms. Miller participated in the interviewing process and recommended that J.B. be hired. J.B. was indeed hired for the position. (N.T. 91; 116-117).

15. Ms. Miller signs personal leave request forms indicating that her schedule in the cafeteria is covered for the requesting employe's absence. Then the employe takes the request form to the principal's office for signature. The District does not require the approval of the building principal to give a day off to a cafeteria worker; it requires the approval only of the head cook. Ms. Miller will substitute workers to fill voids in the work schedule created by an employe's leave. Ms. Miller has the responsibility to ensure that the cafeteria has enough employes working on a given day to operate properly. (N.T. 44-45, 100-101, 110-111, 119).

16. On one occasion, the District denied leave to a cashier because her leave request lacked Ms. Miller's signature. Ms. Miller did not approve of the leave because the employe took leave at Thanksgiving every year precluding other cashiers from taking leave at that time. (N.T. 101-102).

#### DISCUSSION

After the Union presented its case-in-chief at the hearing, the District submitted an oral Motion to Dismiss the Petition on the grounds that the Union did not establish changed circumstances regarding the head cook and head custodian. I deferred consideration of the Motion at that time. Consequently, the District presented the Motion to Dismiss in detail its post-hearing brief.

#### Motion to Dismiss Petition

In considering the Motion to Dismiss, I am limited to evaluating whether the Union has established a prima facie case, during its case-in-chief, with substantial, competent evidence that is believed by the examiner. Brock v. Lincoln University Chapter, American Ass'n of University Professors, 22 PPER 22158 (Final Order, 1991). The District argues, in support of its Motion, that the Petition is barred by res judicata and should be dismissed because the Union did not offer any "evidence of the job duties of the head cooks and head custodians at the time the Board excluded those positions from the bargaining unit in 1973." (District's Post-hear Brief at 8). The Board has held that it is bound by the doctrine of res judicata in unit determination cases. In the Matter of the Employes of the State System of Higher Education, 30 PPER ¶ 30217 (Final Order, 1999). Once the Board has determined the status of positions and the scope of a bargaining unit through the certification process, there must be a showing of changed circumstances before the Board will re-examine those determinations. Midwestern Intermediate Unit IV v. PLRB, 16 PPER ¶ 16109 (Court of Common Pleas of Butler County, 1985). However, res judicata does not bar a petition to include previously excluded positions where the Board based its exclusion on the parties' stipulation and not pursuant to a litigated determination. In the Matter of the Employes of Chambersburg Area School District, 27 PPER ¶ 27263 (Order Directing Submission of Eligibility List, 1996). Where a stipulation is more than one year old, the parties may relitigate the status of the stipulated position without demonstrating changed circumstances. Id. n.3.

The Board's 1973 Order and Notice of Election establishes that the District and the Union's predecessor indeed litigated the position of head custodian. The Board therein determined that the position was excluded as a statutory supervisor. However, the parties stipulated and agreed to exclude the head cooks from the bargaining unit as supervisors. (F.F. 5). Therefore, the Union was required to establish changed circumstances regarding the position of head custodian, but not the position of head cook. Accordingly, the District's Motion to Dismiss the Union's petition for failure to establish changed circumstances is denied with regards to the position of head cook. I will, however, consider the Motion to Dismiss regarding the position of head custodian only.

Indeed, the Union did not present evidence regarding the circumstances and job duties of the head custodians as they existed in 1973 when the Board excluded those positions. Contrary to the District's argument, however, where the Board has previously adjudicated the status of a position, I am limited to the previous order and the findings of fact regarding the 1973 job duties, which were already established by the Board. I am not at liberty to examine the entire record from that case anew or entertain witness testimony in these proceedings of then-existing job duties. The Board has already determined the weight, sufficiency and credibility of the record evidence and, based thereon, made the relevant and determinative findings of fact. It would be inappropriate of me to now make new findings of fact of then-existing job duties that, based either on witness testimony or the old record, may supplement or contradict the existing findings of fact. Therefore, the ruling on the Motion to Dismiss does not depend on whether the Union presented testimony in this case of the job duties that existed in 1973, as argued by the District. And the question of whether the Union met its burden of establishing a prima facie case of changed circumstances during its case-in-chief will be determined by

comparing the findings of fact, contained within the Board's April 18, 1973 order, to the testimony of current, pre-petition circumstances.

The job duties of the head custodians were delineated in Finding of Fact No. 11 (F.F. 11) in the Board's 1973 Order and Notice of Election. This finding provides as follows:

11. That the head custodians have the power to assign work, make recommendations as to hiring, make recommendations as to discharge or transfer of employes, report to the business manager the quality and quantity of the work, re-arrange working time of employes to cover the schools during extra-curricular activities and are compensated at a rate of 25 to 30 cents per hour above that of other custodians.

(F.F. 11, Northern Tioga, 3 PPER at 108). The current job duties of Head Custodian Butler established during the Union's case-in-chief include the following: scheduling work for night custodians, ordering supplies, approving leave, selecting candidates for interviews, participating in the hiring of custodians, unsupervised control over spending within the custodial budget; and assigning subordinate custodians between Elkland High School and Clark Wood Elementary School. Mr. Butler spends up to one-and-one-half hours of his eight-hour shift doing administrative work. Mr. Butler approves vacations and sick leave. He has received supervisor training from the District. Mr. Butler selects individuals for interviews.

The job duties of the head custodian as found by the Board in 1973 are markedly similar to the current duties. Therefore, the Union has failed to establish a prima facie case that the circumstances of the head custodian position have changed, as required. Accordingly, the District's Motion to Dismiss the Petition is granted with respect to the position of head custodian, and the Petition is barred by res judicata.

#### **Head Cooks**

Having denied the Motion to Dismiss the Petition regarding the head cooks, I will consider the legally competent, substantial evidence of actual job duties of the position of head cook based on the entire record, not only the Union's case-in-chief, to determine whether those job duties satisfy the statutory elements of supervisor. As the party seeking to include the position of head cook, the Union has the burden of proving the necessary facts to support the change in the status of the position. In the Matter of the Employes of Riverview Intermediate Unit #6, 37 PPER 106 (Final Order, 2006); In the Matter of the Employes of the State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999); In the Matter of the Employes of Tunkhannock Area Such. Dist., 29 PPER ¶ 29023 (Final Order, 1997). The Board evaluates the actual job duties of the position in question to make bargaining unit determinations. Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1989); In the Matter of the Employes of Elizabeth Township, 33 PPER ¶ 33053 (Final Order, 2002).

Section 301(6) of PERA provides as follows:

"Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes 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). Also, Section 604(5) of PERA provides in relevant part that "[i]n determining supervisory status the [B]oard may take into consideration the extent to which supervisory and non-supervisory functions are performed." 43 P.S. § 1101.604(5). Applying the law to the facts in this case reveals that, on balance, the job duties of the head cooks satisfy the statutory criteria of supervisor.

Head cooks are the first step in the grievance procedure (oral grievance) under the parties' collective bargaining agreement. The head cook at Elkland High School is Mary Theresa Miller. Ms. Miller has a separate office, with a desk, computer, telephone, calculator and a separate table, wherein she orders food, makes employe assignments, establishes employe schedules and completes state required production records. Ms. Miller does not, and is not required to, obtain approval for scheduling employes. Ms. Miller has the authority to and does transfer employes to different positions.

Ms. Miller recommended discipline for a cashier in the cafeteria. The cashier refused to comply with Ms. Miller's repeated directives not to permit students to purchase more food than they have money for in their accounts. Ms. Miller's supervisor followed the recommendation and wrote the reprimand. Ms. Miller brought the cashier into her own office, verbally reprimanded her and directed the cashier to sign the reprimand. On April 4, 2002, Ms. Miller, without approval, verbally reprimanded another cafeteria employe for publicly confronting a cashier in the cafeteria. This reprimand warned of future progressive discipline for failure to comply with the procedures delineated in the reprimand.

On or about May 19, 2006, Ms. Miller verbally reprimanded four employes for intentionally failing to follow the District's Replacement Meals Policy (Policy). The Policy allows the cafeteria to provide only a peanut butter and jelly sandwich, fresh fruit and milk to a child that comes into school with no lunch or money for three days. The four reprimanded cafeteria workers were giving the students receiving replacement meals a full lunch, with extras, in addition to the peanut butter and jelly sandwich.

Ms. Miller is involved in hiring and selecting new employes in the cafeteria. She selects the individuals for interviews, and she is present as a panel member conducting the interviews. The interview process involves a scoring system whereby each panel member assigns and submits a score in number form. Each panel member's score is given equal weight. She is one of three to five individuals on the interview panel. On one occasion, the District did not hire someone who Ms. Miller wanted, but Ms. Miller was not involved in the hiring process for that candidate. The District has always hired the person recommended by Ms. Miller when Ms. Miller was involved in the hiring process. Following an employe's forty-five-day probationary period, Ms. Miller completes a performance evaluation and recommends whether to hire that person. Ms. Miller also completes performance evaluations for each of her eleven employes at the end of each school year. After reviewing cafeteria personnel files for prospective candidates to fill a full-time cafeteria position, the principal at Elkland and the District Superintendent opposed interviewing a substitute cafeteria worker by the name of J.B. for the position. Ms. Miller contacted the food service director and expressed her desire to have J.B. interviewed. Based on Ms. Miller's recommendation, the District agreed to interview J.B. Ms. Miller participated in the interviewing process and recommended that J.B. be hired. J.B. was indeed hired for the position.

Ms. Miller signs personal leave request forms indicating that her schedule in the cafeteria is covered for the requesting employe's absence. Then the employe takes the request form to the principal's office for signature. The District does not require the approval of the building principal to give a day off to a cafeteria worker; it requires the approval only of the head cook. Ms. Miller will substitute workers to fill in voids in the work schedule created by an employe's leave. Ms. Miller has the responsibility to ensure that the cafeteria has enough employes working on a given day to operate properly. On one occasion, the District denied a leave request to a cashier because she submitted her leave form to the principal without Ms. Miller's approval. Ms. Miller did not approve the leave because that employe took the same leave at Thanksgiving every year, thereby precluding others from taking that time.

On this record, Ms. Miller's duties demonstrate that she has authority in the interest of the District to transfer employes and responsibly direct those employes to perform specific, necessary daily tasks for the effective operation of the cafeteria at the Elkland High School. She has authority to discipline without approval, and when she sought approval to impose discipline, her recommendation was followed. Although she is not solely responsible for hiring cafeteria employes, she has unsupervised control over

selecting candidates for her cafeteria. When she participates in the interviewing of candidates, her hiring recommendations are followed. Also, cafeteria workers will not be granted leave without Ms. Miller's approval. Therefore, "to a substantial degree [she] effectively recommend[s]" the hiring of employes. She independently approves leave and imposes discipline. Accordingly, the duties of the head cook position satisfy the statutory standard for supervisor under Section 301(6) of PERA, and the position must remain excluded from the bargaining unit.

#### CONCLUSIONS

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

1. The District is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The head custodians are supervisors within the meaning of Section 301(6) of PERA, and are not eligible for inclusion in the bargaining unit.
5. The head cooks are supervisors within the meaning of Section 301(6) of PERA, and are not eligible for inclusion in the bargaining unit.
6. The home and school visitors are included in the bargaining unit.
7. The appropriate unit for the purpose of collective bargaining with respect to wages, hours and terms and conditions of employment is as follows:

A subdivision of the employer unit comprised of all full-time and regular part-time teacher aides, custodians, maintenance employes, secretaries, library aides, study hall monitors, cafeteria employes and home and school visitors, and excluding head cooks, head custodians management level employes, supervisors, first level supervisors, confidential employes and guards as defined in PERA.

#### ORDER

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

#### HEREBY ORDERS AND DIRECTS

that the bargaining unit of support personnel at the District certified by the Board at PERA-R-2741-C and amended at PERA-U-06-237-E is hereby amended to include the position(s) of home and school visitors by stipulation, but shall not include the positions of head cook and head custodian which shall remain excluded as statutory supervisors.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this fifth day of February, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner