

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
:
Case No. PERA-U-08-267-W
:
(PERA-R-282-W)
:
ARMSTRONG SCHOOL DISTRICT :

PROPOSED ORDER OF UNIT CLARIFICATION

On July 18, 2008, the Armstrong Education Association (Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification (Petition) seeking to include the positions of occupational therapist and physical therapist in the professional unit at the Armstrong School District (District). On August 14, 2008, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on October 8, 2008 in Pittsburgh, Pennsylvania. On January 9, 2009, the parties filed a stipulation of facts (hereinafter "SOF") without attached exhibits in lieu of participating in a hearing. The parties did not therein indicate whether they would file briefs. As of the date of this order, the parties have not done so.

The hearing examiner, on the basis of the stipulation of facts 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). (SOF 1; PERA-R-282-W).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (SOF 2; PERA-R-282-W).

3. The District employs two persons in the position of Occupational Therapist. (SOF 4).

4. The District employs one person as a Physical Therapist. (SOF 5).

5. The District requires the occupational therapists to hold a Bachelor's Degree and requires them to be licensed as occupational therapists by the Commonwealth of Pennsylvania. They are also required to maintain a current valid license to practice occupational therapy while they hold their position at the District. The District requires that occupational therapists possess the same knowledge and skill and exercise the same standard of care that is exercised by licensed occupational therapists. (SOF 6-9).

6. The District requires the physical therapist to hold a bachelor's degree. The District also requires its physical therapist to be licensed as a physical therapist by the Commonwealth of Pennsylvania. The physical therapist is also required to maintain a current valid license to practice physical therapy while holding a position at the District. The District requires that the Physical therapist possess the same knowledge and skill and exercise the same standard of care that is exercised by licensed physical therapists. (SOF 6-9).

7. Occupational therapists (OT) at the District are required to perform services in a manner as provided in the American OT Association's General Code of Ethics and the Pennsylvania Occupational Therapy Practice Act. Services must also comply with all applicable provisions of the Individuals with Disabilities Act and relevant chapters of the Pennsylvania State Board of Education's regulations regarding special education services. (SOF 10).

8. The Physical Therapist (PT) is required to perform services in a manner as provided in the American PT Association's General Code of Ethics and the Pennsylvania Physical Therapy Practice Act. Services must also comply with all applicable provisions of the Individuals with Disabilities Act and relevant chapters of the Pennsylvania State Board of Education's regulations regarding special education services. (SOF 11).

9. OTs and the PT at the District make individual assessments of students' conditions and needs, on a daily basis, that are based upon the knowledge they gained in college while earning a Bachelor's Degree in their specialty. (SOF 12).

10. OTs provided services to students that enable them to benefit from the students' special education programs. OTs test students to determine the need for occupation therapy. They evaluate a student's fine motor development for delays and the student's visual and perceptual skills. They also evaluate the student's physical environment to determine whether adaptations are necessary for for learning. OTs also prepare written reports of occupational therapy evaluations. OTs provide recommendations to individual program planning teams for appropriate programming in the area of fine motor development and for adapting an individual student's physical environment. (SOF 13-14, 17).

11. The PT consults with students so they may benefit from the special education program. The PT conducts preliminary screening to determine the need for physical therapy by evaluating a student's gross motor development for delays, by evaluating a student's compatibility with his/her physical environment to explore necessary adaptations for mobility and learning. The PT also prepares written reports of physical therapy evaluations. (SOF 15-16).

12. The physical therapist is responsible for seeing that physical therapy is performed on the student sometimes directly and sometimes through consultative services. (SOF 18-19).

13. OTs and PTs discuss evaluation findings with parents, instructional staff and other persons responsible for developing individual education programs for the students. (SOF 19).

14. The District's building principals and special education coordinators supervise the OTs and the PT. The principals and special education coordinators also supervise other members of the bargaining unit. The OTs and the PT work the same number of days as other members of the bargaining unit. They may, however, be employed for a maximum of ten additional days during the work year. As with other unit members, their assigned work day generally corresponds to the student days as, established by the District's school calendar. They work the same hours per day as other members of the bargaining unit and receive the same benefits. (SOF 20-25).

15. The Association is the exclusive representative of the bargaining unit of regular full-time temporary professional and professional teaching staff which includes classroom teachers, librarians, guidance counselors, public school psychologists, school nurses, dental hygienists, reading specialists and science specialists, as certified by the Board at PERA-R-282-W.

DISCUSSION

As the party seeking to include the positions of occupational and physical therapists in the professional bargaining unit, the Union "must establish an identifiable community of interest between those positions and the positions in the existing unit. In the Matter of the Employes of Riverview Intermediate Unit No. 6, 37 PPER 106 (Final Order, 2006). This is not a strict burden of proof because unit clarification proceedings are investigatory and not adversarial in nature. Id. Therefore, the Union, as the party seeking to change the status quo, has the burden of persuasion only. Id. Moreover, the Union may establish a community of interest with the professional employe unit with the same factors that were relied upon in establishing that the positions are professional. Id.

The parties in this case submitted a mutually agreed upon stipulation of facts that clearly establishes that the positions of occupational therapist and physical therapist are professional positions with a community of interest with the professional unit. Under PERA, a professional employe is defined as follows:

(7) "Professional employe" 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). Both OTs and the PT at the District make individual assessments of the student's conditions and needs, on a daily basis, that are based upon the knowledge they gained in college while earning a Bachelor's Degree in their specialty. OTs determine how qualifying students can benefit from the special education programs. An OT tests students to determine the need for occupation therapy. In making that determination, the OT evaluates a student's fine motor development for delays, his/her visual and perceptual skills and his/her physical environment. As a result, the OTs design therapeutic programs specifically applicable to individual students to satisfy the student's particular needs after assessment. The OTs prepare written reports of occupational therapy evaluations. They provide recommendations to individual program planning teams for appropriate programming in the area of fine motor development and for adapting an individual student's physical environment.

The PT also consults individually with students to determine whether a student may benefit from a special education program that incorporates physical therapy. The PT conducts preliminary screening to determine the need for physical therapy consultation. The PT also evaluates candidates' gross motor development for delays, and evaluates a student's physical environment to determine whether a student would benefit from adaptations to improve mobility and/or learning. The PT, like OTs, also prepares written reports of physical therapy evaluations. The physical therapist is responsible for seeing that physical therapy is performed on the student sometimes directly and sometimes through consultative services. Both OTs and the PT discuss evaluation findings with parents, instructional staff and other persons responsible for developing individual education programs for the students.

The competent, substantial evidence of record satisfies all four elements of the definition for "professional employe" contained in Section 301(7) of PERA. The facts support the conclusion that the duties of both the occupational therapists and the physical therapist are predominantly intellectual and varied in character, require consistent exercise of discretion and judgment; require knowledge of an advanced nature customarily acquired by specialized study in an institution of higher learning and they are of such character that the output or result accomplished cannot be standardized.

Although some of the same factors that support the conclusion that the OTs and the PT are professional also support the conclusion that the OTs and the PT share an identifiable community of interest with the employes in the professional bargaining unit, the parties have stipulated to additional facts that also support that conclusion. In determining whether employes share an identifiable community of interest, as required by Section 604(1) of PERA, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours, benefits, working conditions, interchange of employes, grievance procedures and bargaining history. FOP v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999). An identifiable community of interest can exist despite differences in wages, hours and working conditions or other factors. Id.

In this regard, the record shows that the District's building principals and special education coordinators supervise the OTs and the PT. The principals and special education coordinators also supervise other members of the bargaining unit. The OTs and the PT work the same number of days as other members of the bargaining unit, although they may be employed for a maximum of ten additional days during the work year. As with other members of the bargaining unit, the assigned work day for the OTs and the PT generally corresponds to the student days as established by the District's school calendar. OTs and the PT work the same hours per day as other members of the bargaining unit, and they receive the same benefits as the other members of the bargaining unit. Therefore the OTs and the PT share the same hours, benefits and working conditions. They work in the same buildings and in the same environment with students in a professional capacity as the other members of the professional unit. Also, they have similar required advanced levels of education and licensing or certification.

Accordingly, the OTs and the PT are professional employes who share an identifiable community of interest with the other members of the professional bargaining unit, and the

professional bargaining unit certification shall be amended to include the positions of occupational therapist and physical therapist.

CONCLUSIONS

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

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 position of occupational therapist is a professional position within the meaning of Section 301(7) of PERA.
5. The position of physical therapist is a professional position within the meaning of Section 301(7) of PERA.
6. The occupational therapists and the physical therapist share and identifiable community of interest with the employes in the existing professional bargaining unit at the District.
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 temporary professional and professional teaching staff which includes classroom teachers, librarians, guidance counselors, public school psychologists, school nurses, dental hygienists, reading specialists, science specialists, occupational therapists and physical therapists; and excluding managers, supervisors, first level supervisors, and confidential employes as defined in the Public Employe Relations Act.

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 professional employes at the District, certified by the Board at PERA-R-282-W and previously amended at PERA-U-88-77-W, is hereby amended to include the positions of occupational therapist and physical therapists.

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 thirteenth day of February, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner