

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-08-313-W
 : (PERA-R-298-C)
 WYOMING AREA SCHOOL DISTRICT :

PROPOSED ORDER OF UNIT CLARIFICATION

On August 13, 2008, Wyoming Area Education Association, PSEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employee Relations Act (PERA) seeking to include the position of athletic trainer in the bargaining unit of professional employes of the Wyoming Area School District (District).

On October 1, 2008, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on Wednesday, October 22, 2008. After a series of granted continuance requests the hearing was held on March 13, 2009, at which time both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. Only the District filed a post-hearing brief.

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. The District is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-298-C).
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-298-C).
3. On February 12, 1971, the Board certified the Association as the exclusive representative of a bargaining unit of District employes, which is comprised of "full-time classroom teachers under contract to the school district, guidance counselors, nurses, and librarians." Excluded from the unit were, "all non-professional employes, supervisors, first level supervisors, and confidential employes as defined in [PERA]." (PERA-R-298-C).
4. The District has employed Laura Mudlock as an athletic trainer since 2000. (N.T. 4).
5. The District required Mudlock to maintain a "Class A Certification as an Athletic Trainer...." To do so required attaining a college degree and passing the National Athletic Training Association (NATA) Board of Certification examination. Mudlock graduated from West Chester University in 2000, with a Bachelor of Science degree in Sports Medicine/Athletic Training, and passed the NATA exam that same year. In order to be a licensed athletic trainer in Pennsylvania, one must have taken and passed the NATA examination. (N.T. 4-7; Union Exhibit 1).
6. Mudlock works approximately seven hours a day from 2 p.m. to 9 p.m., Monday through Friday, although she may occasionally be called upon to work on the weekends as well. Her work day has, at times, included starting as early as 7:00 A.M., and finishing as late as 10:00 P.M. (N.T. 21-24).
7. Mudlock is the athletic trainer for the District's 60 sports teams, including football, baseball, basketball, softball, track, tennis, golf, soccer, swimming, wrestling, volley ball and cheerleading. She is responsible for both male and female sports teams. Mudlock's work year starts two and one-half weeks before the students return to classes, and finishes in May, unless the District's teams are in play-offs, in which case her work year is longer. (N.T. 14, 15).

8. Mudlock's job includes the prevention, recognition, treatment and rehabilitation of athletic injuries sustained by the District's athletes. She accomplishes these tasks by determining if an athlete has, in fact, sustained an injury; and if so, ascertains just what the injury is. She then determines whether continued play is proper. Mudlock also determines whether the injury warrants either a physician's care or hospitalization. She works under the direction of a supervising physician. Mudlock exercises independent judgment for medical decisions, including diagnosis, treatment and referrals, based upon her knowledge of an advanced nature, gained from her degree in Sports Medicine. Mudlock is trained to recognize and evaluate head trauma. She is trained to recognize and evaluate joint injuries. (N.T. 8-10, 12, 13).

9. In performing her duties as an athletic trainer, Mudlock must respond to various situations that arise with student athletes, including emergencies occurring on the field. (N.T. 8).

10. The work that Mudlock performs cannot be quantified on a numerical basis, and is different every hour of every day. (N.T. 14, 17).

11. In performing her job duties, Mudlock interacts with coaches and nurses. (N.T. 15-17).

12. Many of the coaches with whom Mudlock interacts are also faculty members. (N.T. 16).

13. Mudlock's office is in the District's high school. She also travels to the District's football stadium field house. (N.T. 21-22).

14. Mudlock was hired by the District's school board and receives a salary. She receives the same number of paid sick days and personal days as do members of the professional bargaining unit. Mudlock also receives the same health, dental and vision insurance as do professional bargaining unit members. (N.T. 15).

DISCUSSION

The Association seeks to accrete the position of athletic trainer into the District's certified, professional bargaining unit. The District opposes that inclusion. Because the District's reasons for opposing this inclusion are completely baseless and diametrically opposed to the Board's prior decisions, the position of athletic trainer is properly included in this unit.

Despite a plethora of Board law to the contrary, the District asserts that athletic trainers are not professional employees. The District also argues that the athletic trainer does not share a sufficient community of interest so as to be properly placed in the professional unit.

We first examine the District's jejune argument that the athletic trainer does not share a sufficient community of interest to appropriately be in the professional unit. Section 604 of PERA describes the Board's responsibilities in determining the appropriateness of the unit.

Section 604 of PERA provides in relevant part:

"The Board shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the board shall:

- (1) Take into consideration but shall not be limited to the following:
 - (i) public employes must have an identifiable community of interest, and
 - (ii) the effects of overfragmentization."

43 P.S. § 1101.604.

To determine whether employes share an identifiable community of interest, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours and benefits, areas of work, working conditions,

interchange of employes, supervision, grievance procedures, bargaining history, and employe desires. Fraternal Order of Police v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999); West Perry School District v. PLRB, 752 A.2d 461 (Pa. Cmwlth. 2000), affirming, 29 PPER ¶ 29110 (Final Order, 1998); Allegheny General Hospital v. PLRB, 322 A.2d 793 (Pa. Cmwlth. 1974).

An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours and working conditions or other factors. As the Commonwealth Court stated in Western Psychiatric Institute and Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974):

"We do not read Section 604 [of PERA] to mean . . . that an identifiable community of interest cannot exist without some differences in requirements of experience, skills and education . . . To accept [that] proposition would lead to . . . over-fragmentization . . . [T]he Board's determinations may not ignore the effects of over-fragmentization and . . . the units must be as few as practicably can be"

Id. at 260.

Here the athletic trainer receives a salary, reports for work at the District's high school, and interacts with members of the bargaining unit, including nurses and faculty members who also serve as coaches. Her work year starts about two and one-half weeks before students arrive at school. The athletic trainer receives the same health, dental and vision coverage as do members of the bargaining unit. She also gets the same number of personal and sick days as do bargaining unit members. Based on these factors, I find that the athletic trainer shares an identifiable community of interest with members of the professional bargaining unit. While there are some differences between the athletic trainer and the positions in the existing unit, they do not destroy the community of interest that otherwise exists.

Amazingly, the District argues that the athletic trainer has no community of interest with members of the professional unit because she "does not perform the duties of the school nurse or instruct classes....[and she] is not supervised by an individual who also supervises other professional unit members...." (District's brief at 5). Even more amazingly, the District calls these "weighty factors" in determining whether the athletic trainer has a sufficient community of interest to be in the professional unit. They are no such thing.

The District attempts to take ancillary facts merely mentioned in prior Board cases, and turn them into the determining factors for establishing community of interest. Such a tactic merely highlights the dearth of any real authority in support of the District's arbitrary legal position.

In a more cryptic argument, the District asserts that if its above-quoted position is not accepted, then "there is virtually no set of circumstances in which a professional independent contractor[,] working for a school district[,] would not be accreted into a professional bargaining unit if it was [sic] the pleasure of the union to accrete that position into the professional unit." (District's brief at 7).

Of course, the first and most obvious fallacy in that statement is that an independent contractor is not an employe of the District, but is, by his very title, an independent contractor and, therefore, ineligible for membership in the bargaining unit. This argument bespeaks but a sciolistic understanding of Board law.

The District also argues that the position of athletic trainer should be excluded from the professional bargaining unit because it is not professional. As the party seeking exclusion of the position from the unit, the District has the burden of proof. SSHE, 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). Section 301(7) of PERA defines "professional employe" as:

"[A]ny 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).

The Board has consistently found that athletic trainers are professional employees for purposes of PERA. Norwin School District, 31 PPER ¶ 31104 (Final Order, 2000); Belle Vernon Area School District, 31 PPER ¶ 31017 (Final Order, 1999); Elizabeth Forward School District, 29 PPER ¶ 29015 (Proposed Order of Unit Clarification, 1997). The same result must obtain here because the athletic trainer position obviously meets the four-part test for a professional employee.

The District does not contest that as the party seeking exclusion of the athletic trainer from the professional unit, it has the burden of proof. SSHE, *supra*. Stuningly, the only evidence offered by the District to prove that exclusion was to call the District's athletic director who testified that the athletic trainer works for him, and that he doesn't think her to be a professional employee. (N.T. 27-28).

With all due respect to the athletic director, it does not matter one evidentiary wit what his opinion is. Rather, the factors set forth in Section 301(7) of PERA determine professional status, and not the off-the-cuff opinion of another employee. Incredibly, that opinion was the entire sum of evidence the District had to offer in support of its opposition.¹

Indeed, while the District argues with a straight face that the work of the athletic trainer is routine and does not require consistent exercise of discretion and judgment, the record evidence overwhelmingly indicates otherwise.

The athletic trainer makes assessments concerning the health of student athletes, takes action to prevent injuries and facilitate recovery from injuries, and responds to any situations in which student athletes incur injuries or trauma. She also relies on her discretion, judgment, training and education in deciding whether the student athletes may continue to practice or play, should be referred to a physician or treated by the trainer on site. In Norwin, *supra*, the Board stated that performance of similar duties satisfied the four-part standard for professional status under PERA. Accordingly, the position of athletic trainer is professional and will be included in the bargaining unit represented by the Association.

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 for purposes of Section 301(1) of PERA.
2. The Association is an employe organization for purposes of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The position of athletic trainer is professional within the meaning of Section 301(7) of PERA.
5. The position of athletic trainer shares an identifiable community of interest with members of the professional bargaining unit represented by the Association.

ORDER

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

¹ The District attempted, but was unable, on more than one occasion, to introduce what Counsel for the District asserted was the athletic trainer's job description. No witnesses could identify or authenticate the document, including the athletic trainer, herself. (N.T. 21-22, 28-29).

HEREBY ORDERS AND DIRECTS

that the Certification of Representative issued on February 12, 1971 at Case No. PERA-R-298-C is hereby amended to include the position of athletic trainer, and

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 thirtieth day of October, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

PETER LASSI, Hearing Examiner
TIMOTHY TIETZE, Hearing Examiner