

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-08-266-E
 : (PERA-R-02-499-E)
BRANDYWINE HEIGHTS AREA SCHOOL :
DISTRICT :

PROPOSED ORDER OF UNIT CLARIFICATION

On July 17, 2008, the Brandywine Heights Educational Support Personnel Association (Association) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to include, *inter alia*¹, the position of payroll/insurance/mail bookkeeper in the unit of nonprofessional employes in the Brandywine Heights Area School District (District), currently certified by the Board.

On August 8, 2008, the Board Secretary issued an Order and Notice of Hearing, wherein a hearing was scheduled for October 16, 2008, in Harrisburg, Pennsylvania. After a series of granted continuance requests, the hearing was rescheduled for, and held on, February 5, 2009, at which time all parties in interest were afforded a full opportunity to present evidence and to cross examine witness. Each party filed a post-hearing brief.

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

FINDINGS OF FACT

1. The District is a public employer.
2. The Association is an employe organization.
3. The District Superintendent, Dr. Handler, and the District Business Manager, Steven Fischer, each have a confidential secretary who is excluded from the bargaining unit. (N.T. 22, 25, 36).
4. In 2008, the Association asked for the job description of Kathy Hassler. In response to that request, the Association received Association Exhibit 3 which is the job description for the payroll/insurance/mail bookkeeper. (N.T. 19; Association Exhibit 3).
5. Hassler has worked for the District for twenty-two years. Her job duties include working with other secretarial employes; maintaining payroll records; distributing, receiving, verifying employment information and entering it into the District's system; verifying time card totals; maintaining payroll deductions and budget payroll distribution records; preparing tax forms; processing paychecks; maintaining District records for audits; assisting employes with insurance questions; answering telephones and assisting in the sorting of mail. (N.T. 29, 33-36; District Exhibit 1, Association Exhibit 3).
6. Fischer recommended to the superintendent that Hassler be at the bargaining table for the set of negotiations that started in January 2009. Fischer made that recommendation at about the same time that the Association filed the instant unit clarification. (N.T. 59-60).
7. Hassler has similar job functions, works a similar schedule, and is paid similarly to bargaining unit members (N.T. 21, 22, 23; Association Exhibit 3, District Exhibit 1).

DISCUSSION

The Association seeks to have the position of payroll/insurance/mail bookkeeper included in a certified nonprofessional bargaining unit. The parties stipulated to the

¹ The Association withdrew its petition insofar as it asked to have the positions of head custodian and transportation coordinator included in the unit. (Ms. Wine's letter dated September 16, 2009, docketed September 18, 2009).

unit composition. (PERA-R-02-499-E). More than a year after that election the Association seeks to accrete the position into the unit. The District takes the antipodal position.

Because the Association has shown a sufficient community of interest², and the District has not proved that the position is confidential, the position is properly accreted into the bargaining unit.

A review of Board law concerning the confidentiality exception to membership in the bargaining unit under the Public Employee Relations Act (PERA) is a helpful place to start.

PERA sets forth the evidentiary burden to be met by the party seeking the confidential exclusion in 43 P.S. § 1101.301(13):

'Confidential employee' shall mean any employee 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.

This legislatively created exclusion is a narrow one, PLRB v. Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978), and to that end the Board has ruled that "[a]ny determination of confidential status must be supported by clear and convincing evidence." Bangor Area School District, 9 PPER ¶ 9295 at 534 (Nisi decision and Order, 1978).

Indeed, our Supreme Court has opined that Section 301(13)(i) applies "to those employes whose inclusion in the bargaining unit would prevent the employer from bargaining with the union on even terms[,]" Altoona, 480 Pa. at 159, 389 A.2d at 559; while Section 301(13)(ii) applies to "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." 480 Pa. 155, 389 A.2d at 557.

In keeping with the stenotic nature of the confidential exception, the Board has consistently ruled that an employer may not scatter confidential duties among more employes than is necessary, to increase the number of positions excluded from the bargaining unit. West Jefferson Hills School District, 25 PPER ¶ 25137 (Final Order, 1994).

There is no dispute here that both the superintendent and the business manager already each have a confidential secretary. There is no testimony that the business manager's confidential secretary cannot perform any or all of the confidential duties allegedly assigned to the payroll/insurance/mail bookkeeper. Moreover, the duties supposedly supporting Hassler's confidential status are vague and, frankly, her answers seem coached. Regardless of the question asked, Hassler managed to add, gratuitously, that she was working closely with the business manager and that she was involved with bargaining.

Responding to the question about whether she worked with other secretaries, Hassler volunteered that she worked closely with the business manager. When asked if she worked with numbers, she responded that she made "recommendations" for bargaining proposals. When asked if she had priced out District proposals, Hassler's response was, "I will also say, you know, 'One percent is low, start with this percent.'" Hassler went on to assert that she has a deciding voice in what the District offers in negotiations.

Hassler also asserted that, in the past, the business manager would report to her after negotiation sessions just what the District's was offering in those discussions.

According to the District's proofs, Hassler's duties seem to fall into two distinct areas; pricing out proposals, and having input into the formation of bargaining proposals. The pricing out of District proposals, without more, does not make Hassler's position confidential. Trinity Area School District, 22 PPER ¶ 22125 (Final Order, 1991).

² While the District refused to stipulate to an identifiable community of interest should it fail to prove confidential status for the position in question, it abandoned that position when it pretermitted the issue in its brief.

Moreover, given the fact that the business manager has a confidential secretary, his supposed discussions with Hassler about bargaining strategy merely highlight the need for the Board's admonition about not scattering confidential duties among more employees than is necessary.³ Cheltenham School District, 32 PPER ¶ 32052 (Proposed Decision and Order, 2001), 32 PPER ¶ 32098 (Final Order, 2001).

When pressed by the Association about the specifics of her involvement in developing bargaining strategy for the District, Hassler's answers were nubilous. By way of example, here's an excerpt from Hassler's cross examination by the Association concerning her role in recommending bargaining positions for the District:

Q: Let me ask you first, what specific recommendations are you giving?

A: Rates

Q: Wage rates?

A: Wage increases. I do—and like I said, the Capital Blue Cross, because they have to contract so much. Their contribution part of it. You know, things like that.

Q: And how do you formulate your recommendations?

A: By what—okay, you take the paper and you have it written down. You decide.

Q: Have what written down?

A: You'll have like a salary. . .

Q: Of an employee?

A: Like I said, you want to give them 40 cents, you want to give them 50 cents.

Q: Okay.

A: Then you come down to a medium.

Q: And[,] how do you personally arrive at the recommendations that you are giving to the [D]istrict?

A: What's best for the [D]istrict or the employee.

(N.T. 43).

Here's an example of another exchange between Hassler and the Association's attorney:

Q: Well, I mean, if you're part of the [negotiating] team[,] do you offer feedback as to what the [bargaining] strategy should be?

A: Yes

Q: In terms of what?

A: Rates. Raises. Starting rates. But that's not actually part of the bargaining unit. That's part of the district. I do what their co-pay would be for their insurances, you know. This is what the insurance is going to be, this is what they should be paying. You know, I offer input on those things.

Q: And your input is based upon the numbers you crunch?

A: Some of it, yeas.

Q: What would the rest of it be?

A: Well, it's because of economy and things like that, you know, you have to look at all the—that type factors [sic] what I feel they should offer.

(N.T. 37-38).

Then there is the issue of the District giving the Association one job description for this position but introducing another at the hearing. In 2008, the Association asked for and was given a copy of Hassler's job description by the District, before filing this instant petition for unit clarification. The document the District gave in response to that request was Association Exhibit 3. That exhibit was signed by the superintendent in March of 2000. Surprisingly, when asked to authenticate this job description, Hassler referred to it as her "old job description."

According to Hassler, the job description changed in 2000 and again in 2005. (N.T. 29). Hassler testified that she's been involved in collective bargaining since 1990 (N.T.

³ During the hearing, counsel for the District asked a series of leading questions of Hassler. (N.T. 40-42). Since these questions essentially gave the answers to the witness, I have given those answers little credit. In the Matter of the Employees of Hampfield School District, 39 PPER 54, n.3 (Order Directing Submission of Eligibility List, 2007).

32), ten years before the March 2000 job description. Amazingly, there is no mention of any duties involving collective bargaining in that document, even though Hassler asserts she had already been involved for ten years.

Fischer, the business manager, identified District Exhibit 1 as the current job description for Hassler. Counsel for the Association had not seen it before (N.T.47). The material change was that the District's exhibit added the hand-written phrase "prepares salary and benefit schedules for negotiations." Fischer had no idea when this job description was revised, until he was prompted by counsel. (N.T. 49). The District offered no reason why it gave the Association a job description that was years outdated. Moreover, the job description that the District asserted was current was simply the old one with the title crossed out by hand and the new, self-serving title "Benefit/Payroll Manager" hand written in. How the District could give the Association a job description for a job title that hadn't existed, according to the District for three years, is not explained by the District.⁴ For these reasons I have given little evidentiary weight to District Exhibit 1.

Fischer testified that he involves Hassler in the negotiations

because of her contact with the people in the public. She is very sociable, knows what's going on in the community, has a feel for the local environment, and I really rely on discussing with her to get the—I'm trying to think of the right word. You know, what we should be offering, especially an example is in this current economic climate, what is the tolerance level of increases within the community that they would accept versus what might be demanded at the [bargaining] table.

(N.T. 49-50).

When the District was considering subcontracting its food services, Hassler priced out the District's potential savings. (N.T. 53). But then, according to Fischer, he asked Hassler her opinion about the fate of food service employees who might lose their jobs because "I want to know how it's going to impact these individuals." (N.T. 54). Fischer testified that he also wanted "to get a feel for the individuals and what it's going to do to them. As far as unemployment, who's going to be able to collect unemployment, what's their possibility for being rehired." (N.T. 54). Such solicitations of opinion do not make Hassler privy to the District's bargaining strategy.

Essentially, then, aside from merely costing out various possible District offers, the District seeks Hassler's opinion about the popularity of its possible bargaining positions. In a moment of candor, Fischer, when asked if Hassler was a force in the bargaining process or "primarily responsible for crunching numbers[,] " answered, "Crunching numbers." (N.T. 60). That is not confidential work.

To the extent the District has shown Hassler performs any confidential work, the District has not shown that it needs Hassler as an additional confidential employee. She is, therefore, properly accreted into 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 the Act.
2. The Association is an employe organization within the meaning of Section 301(3) of the Act.
3. The Board has jurisdiction over the parties hereto.

⁴ Even if the District, by some innocent error, gave the Association an outdated job description, when the District received the unit clarification petition and saw that the Association had used the archaic name of the position in question, it would have noticed that there was some mistake because the job description was attached to the charge.

4. The position of payroll/insurance/mail bookkeeper, benefit/payroll manager⁵, shares a sufficient community of interest so as to be accreted into the certified bargaining unit.

ORDER

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

HEREBY ORDERS AND DIRECTS

that for purposes of collective bargaining, the payroll/insurance/mail bookkeeper, benefit/payroll manager, is accreted into the existing bargaining unit, defined in PERA-R-02-499-E.

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 and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this ninth day of April, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

⁵ So there is no misunderstanding, I am referring to this one position by both the title in the old and new job description.