

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: CASE NO. PERA-U-19-88-W
: (PERA-R-91-188-W)
: :
BELLE VERNON AREA SCHOOL DISTRICT :
:

PROPOSED ORDER OF UNIT CLARIFICATION

On April 17, 2019, the Belle Vernon Area Education Association, PSEA/NEA (Association) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to include the Psychologist classification into an existing unit of professional employees of the Belle Vernon Area School District (District) certified at PERA-R-91-188-W.

On May 9, 2019, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating August 23, 2019, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was held on August 23, 2019, in Pittsburgh, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The District filed a post-hearing brief in support of its petition on October 15, 2019. The Association filed its post-hearing brief on December 6, 2019.

The Hearing Examiner, on the basis of the evidence 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 pursuant to PERA. (N.T. 4).
2. The Association is an employee representative pursuant to PERA. (N.T. 4-5).
3. The Association is the exclusive representative of a bargaining-unit consisting of all full-time and regular part-time professional employees of the District including but not limited to teachers, counselors, nurses, librarians, athletic trainers, athletic directors, social workers, school counselors, and speech therapists; and excluding management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act. (PERA-R-91-188-W, PERA-U-98-243-W, PERA-U-19-47-W).
4. Tiffany Jamieson is the District's School Psychologist. Jamieson has a bachelor's degree in psychology and a master's degree with a school psychologist specialization. (N.T. 20-21, Union Exhibit 3).
5. Jamieson applied for the School Psychologist position in response to an online advertisement posted by the District. The advertisement for the

position required a Master's or Doctorate in school psychology as well as Pennsylvania certification as a School Psychologist PK-12. (N.T. 21-22; Union Exhibit 4).

6. Jamieson shares an identifiable community of interest with the members of the professional unit. (N.T. 119).

7. Jamieson was hired in August, 2018. (N.T. 115).

8. Jamieson serves as the only School Psychologist in the District. Her immediate predecessor, Dana Sikora, served as both School Psychologist and Director of Special Education. After Sikora left the position two new positions were created by the District: Jamieson's School Psychologist position and the position of Coordinator of Student Services, which is held by Cassandra Bozek. (N.T. 14, 29, 96).

9. Jamieson works in all of the buildings of the District. The majority of her time is spent testing and assessing students for special education services and gifted services. She meets with students one-on-one and completes educational evaluations. She then takes her findings and consults with building principals, teachers, counselors, nurses and parents to discuss her findings. She works side by side with and collects information from other teachers, counselors, nurses and parents. (N.T. 22-26, 68).

10. Jamieson's duties include responding to referrals for special education students who are struggling academically, emotionally, or behaviorally in the school setting. She also is responsible for screening and evaluating students for the school's gifted program. Most of Jamieson's time is spent working on behalf of special-education students. In the 2018-2019 school year, Jamieson completed 110 evaluations of students. Of those, 14 were for gifted students and the remainder were for special education students. (N.T. 24-25, 49, 70).

11. As part of her duties, Jamieson developed a screening and evaluation process for gifted students. Shortly after Jamieson was hired in August, 2018, the Superintendent, Dr. Dowell, brought concerns to Jamieson's attention about the District's gifted program. Jamieson reviewed the then-existing screening and evaluation process and determined it was not sufficient to meet state criteria for the proper assessment and evaluation of students. Jamieson's new screening and evaluation measures were approved by the School Board after a presentation by Jamieson and Bozek. (N.T. 24-25, 47, 54-56, 71-72; 115-117; Union Exhibit 5).

12. The selection of screening or assessment tools used to assess students is part of the professional training of a School Psychologist. School Psychologists routinely select their own tests and screening measures as part of the regular discharge of their professional duties. (N.T. 65-66).

13. When a student qualifies for gifted or special education services, a multidisciplinary team meeting is held to discuss the findings developed by Jamieson. The team typically consists of the principal of the building in which the student is located, the student's teachers, the student's parents, and any additional relevant support personnel such as speech therapists or physical therapists. The multidisciplinary team, as a whole, makes the final

decision with respect to individualized education programs (IEPs) and the concomitant allocation of District resources. The multidisciplinary committee also reviews Jamieson's findings with respect to a student's eligibility for gifted services. If the student is found to be eligible for gifted services, a GIEP (gifted individualized education plan) team creates a gifted education plan for the student. The GIEP team consists of the student's teacher, the gifted education teacher, and the student's parents. Once a GIEP is created, Bozek makes the final decision to allocate District resources and approve the GIEP. (N.T. 26-29, 49-53, 108-109).

14. Jamieson reports directly to the District Superintendent. (N.T. 30).

15. Jamieson attends bi-weekly administrative meetings. Present at these meetings are the Superintendent, Dr. Dowell, the principals from each school building, and Bozek and Jamison. (N.T. 36, 101-102).

16. Jamieson does not set or develop a budget. (N.T. 43).

17. Jamieson does not have the authority to take corrective action against employes when she finds noncompliance with special education or gifted program procedures. (N.T. 75-76).

18. The District has a policy with respect to Gifted Education. The Gifted Education Policy was adopted by the District's Board on September 22, 2014 and revised on October 24, 2016. (N.T. 46; District Exhibit 1).

DISCUSSION

The Association's Petition seeks to include the Psychologist position into a previously existing unit of professional employes. At the hearing, it was established that the correct title for the position was School Psychologist. The position is currently held by Tiffany Jamieson.

The parties agreed after the testimony of the witnesses at the hearing that the School Psychologist shares an identifiable community of interest with the members of the professional unit pursuant to Section 604(1)(i) of the Act (PERA). 43 P.S. § 1101.604(1)(i).

The District argues that the School Psychologist should be excluded from the professional unit because she is a management level employe.¹ The party arguing for the exclusion of an employe from a unit on a statutory ground bears the burden of proving a basis for the exclusion. School District of Philadelphia v. Commonwealth of Pennsylvania, PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998).

Section 301(16) of PERA states:

"Management level employe" means any individual who is involved directly in the determination of policy or who responsibly directs

¹ The District argued at the hearing that the School Psychologist position was supervisory but conceded in its Brief that the position is not a supervisory employe according to the Act. (District's Brief at 2).

the implementation thereof and shall include all employees above the first level of supervision.

43 P.S. § 1101.301(16). Under this provision, a position is at the management level if the employee holding that position (1) is involved directly in the determination of policy; (2) directs the implementation of policy; or (3) is above the first level of supervision. Pennsylvania Association of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1988); Commonwealth of Pennsylvania (Attorneys Examiner I), 12 PPER ¶ 12131 (Final Order, 1981). In Pennsylvania Association of State Medical Hospital Physicians v. Commonwealth, PLRB, 554 A. 2d 1021 (Pa. Cmwlth. 1989), the Commonwealth Court adopted the Board' s definition of the first part of Section 301(16) of PERA as set forth in Horsham Township, 9 PPER 9157 (Final Order, 1978):

An individual who is involved directly in the determination of policy would include not only a person who has authority or responsibility to select among options and to put proposed policies into effect, but also a person who participates with regularity in the central process which results in a policy proposal and a decision to put such proposals into effect. Our reading of the statute does not include a person who simply drafts language for the statement without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

Id.

The Board's policy is that the use of independent judgment and discretion by the employee when implementing the employer' s policies is necessary to satisfy the second prong of the statutory test for management level employee under Section 301 (16) of PERA. Id.; Municipal Employees of Borough of Slippery Rock v. PLRB, 40 PPER 64 (Proposed Order of Unit Clarification, 2009), 40 PPER 122, (Final Order, 2009), aff'd 14 A.3d 189 (Pa. Cmwlth. 2011). In order to be considered a management level employee, the employee must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found. Slippery Rock, 14 A.3d 189 (Pa. Cmwlth. 2011).

Importantly for this case, the Commonwealth Court has opined that an employee's decisions are not managerial if they are part of the employee's routine discharge of professional duties. Borough of Slippery Rock, 14 A.3d 189 (Pa. Cmwlth. 2011). The Board has held that making decisions that effectuate the responsibilities of the position is not synonymous with managerial policy formulation or implementation. Pennsylvania State University (Penn State), 19 PPER ¶ 19156 (Final Order, 1988). The Penn State Board held that a nurse practitioner's formulation of medical protocols was the result of professional expertise and not indicative of managerial authority. The Penn State Board relied on General Dynamics Corp., 1013 NLRB 851 (1974) and opined as follows:

Judgments of professional employees which transcend the technical discipline of professionals should be distinguished from those instances where the natural and normal performance of professional duties may

affect the employer's policy merely by the specialized nature of the professional's normal tasks.

Penn State, 19 PPER at 378. When the only policies developed by the person holding the position in question are policies entirely within the expertise of the position and applicable to the duties of the position, such policies are not considered managerial, even though there may be some indirect impact on operations or managerial policy. Id. In Abington Heights Sch. Dist., 42 PPER 18 (Final Order, 2011), the Board affirmed a hearing examiner's determination that a behavioral specialist position was not managerial where the policy developed by the behavioral specialist was a policy entirely within the professional expertise of the position. Furthermore, Hearing Examiners of this Board have found that School Psychologists are not managerial by virtue of the administration of their professional expertise. Bethel Park School District, 29 PPER 29219 (Proposed Order of Unit Clarification, 1998).

In this matter, the record is clear that Jamieson, as School Psychologist, uses her professional expertise when performing her duties and does not perform duties indicative of managerial authority. In its Brief, the District argues that Jamieson is managerial due to her involvement in the determination of and implementation of the District's Gifted Policy. (District's Brief at 3-7). The argument that Jamieson determined the District's Gifted Policy is undermined by the fact that the Gifted Policy was adopted and revised to its current form two years before Jamieson was ever hired by the District. The Gifted Policy was last revised in 2016 and Jamieson was hired in 2018. Therefore, it is impossible for Jamieson to have had any role in the determination of the District's Gifted Policy, which was promulgated before her arrival.

It is true that Jamieson developed a screening and evaluations process for gifted students which, necessarily, impacts the Gifted Policy. Shortly after Jamieson was hired in August, 2018, the Superintendent Dr. Dowell brought concerns to Jamieson's attention concerning the District's gifted program. Jamieson reviewed the then-existing screening and evaluation process and determined it was not sufficient to meet state criteria for the proper assessment and evaluation of students. Jamieson's new screening and evaluation measures were approved by the School Board after a presentation by Jamieson and Bozek. I find that these activities by Jamieson are squarely within her area of expertise as a School Psychologist, activities she was trained to do and certified by the State to conduct, and not evidence of the determination or implementation of policy sufficient to create managerial authority. Penn State, supra.

The District further argues that Jamieson is responsible for the implementation of the Gifted Policy because she provides directives to other employees regarding the completion of forms and tools used to determine whether a student should receive gifted services. (District's brief at 7). However, the record reflects that Jamieson does not have the authority to take corrective action against fellow employees when she finds non-compliance. Therefore, Jamieson is not a management level employee on this argument from the District. Borough of Slippery Rock, 14 A.3d 189 (Pa. Cmwlth. 2011).

CONCLUSION

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 within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The School Psychologist is a professional employe and shares an identifiable community of interest with the other members of the bargaining unit and is properly included in the bargaining unit.
5. The School Psychologist is not a management level employe.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the bargaining unit is amended to include the position of School Psychologist.

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 order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this fifth day of June, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner