

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
LOWER BUCKS COUNTY :
JOINT MUNICIPAL AUTHORITY : Case No. PERA-U-07-458-E
 : (PERA-R-81-596-E)

PROPOSED ORDER OF UNIT CLARIFICATION

On October 26, 2007, the Lower Bucks County Joint Municipal Authority (Authority) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification (Petition) seeking to exclude the position of Financial Assistant to the Director, formerly known as the Assistant to the Director, from the unit of first level supervisors, alleging that the position is either confidential, managerial or professional. The certified exclusive representative for the unit of supervisors is the United Automobile, Aerospace and Agricultural Implement Workers of America, Region 9, (Union). On November 30, 2007, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on Thursday, January 17, 2008, at the Philadelphia State Office Building in Philadelphia, Pennsylvania. The hearing was continued at the request of the Union and without objection from the Authority, and it was rescheduled for March 21, 2008. During the hearing on that date, both parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Authority filed a post-hearing brief.¹

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 PERA. (N.T. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).
3. Janet Keyser has been the Managing Director (Director) of the Authority since 2003. Prior to assuming that position, she was the Assistant to the Managing Director. (N.T. 79).
4. The position of Fiscal Administrator was vacated several years ago, at which time Donna Ferris, as the Assistant to the Director, assumed many of the job duties of the Fiscal Administrator. (N.T. 87).
5. Ms. Ferris is currently the Assistant to the Director. Ms. Ferris is on disability leave and has moved away from the area. She is permitted 19 months for disability leave under the collective bargaining agreement, at the expiration of which she is not expected to return. She left her job on or about January 22, 2007. (N.T. 80-81, 100-102).
6. Laureen Marterella performed the duties of the Assistant to the Director between January 22, 2007 and December 10, 2007, after Ms. Ferris's departure. She was officially assigned to the position vacated by Ms. Ferris in March of 2007. Mid-year 2007, when it became apparent that Ms. Ferris would not be returning to her position, the

¹ The Authority makes two factual representations in its post-hearing brief that will not be considered as part of the factual record in this case. Therefore, the examiner will not consider the representation that Ms. Ferris resigned or that the Authority created a new bargaining unit position, both of which allegedly occurred after the hearing. The post-hearing submission of the job description for the new position will also not be considered.

Authority began changing the position of the Assistant to the Director, which had already assumed fiscal duties from the vacant Fiscal Administrator position. The new position, named the Financial Assistant to the Director, consolidated and combined the duties of both the Fiscal Administrator and the Assistant to the Director. (N.T. 99-102, 109, 111, 122).

7. Ms. Marterella performed the combined duties of the new Financial Assistant to the Director position with occasional assistance from the Authority's accounting consultant. Ms. Marterella is the only individual to hold the position and perform the duties of the Financial Assistant to the Director prior to the filing of the petition. Although the written job description requires a four-year Bachelor of Science degree in either accounting or finance, Ms. Marterella does not have a four-year degree. Ms. Marterella also lacks the experience requirements contained in the written job description. (111-114; Joint Exhibit 4).

8. As Financial Assistant to the Director, Ms. Marterella could not generally perform the following job duties included on the written job description for that position: she could not plan, supervise and organize accounting, fiscal programs, records and activities; she could not assist in the development of annual budgets in coordination with plant superintendents; she could not prepare and forward bills to municipalities regarding bulk water and/or sewer accounts; she could not manage payroll production such as time keeping or tax reporting; she could not maintain fixed assets reporting and related depreciation schedules; she could not process insufficient funds checks; she could not administer insurance policies, evaluate coverage and costs, analyze usage, meet and negotiate with insurance agents, supply agents with required information and develop uniform renewal dates; and she could not perform financial work. (N.T. 115, 119-121; Joint Exhibit 4).

9. Since about December 10, 2007, Patricia Koszarek has filled the new position of Financial Assistant to the Director. Ms. Koszarek's job duties and performance in this position are post-petition.

10. When Ms. Keyser was the Assistant to the Director, she was "more or less, the notetaker, typing the notes for [the Director]," regarding collective bargaining contract negotiations. When Ms. Ferris was the Assistant to the Director, she was part of management's negotiation team and spoke on behalf of management during negotiations; she was an active participant in contract negotiations on behalf of management. (N.T. 91-92).

DISCUSSION

The Authority seeks to have the position of Financial Assistant to the Director, which was recently created by consolidating the two previous positions of Fiscal Administrator and Assistant to the Director, removed from the bargaining unit of first-level supervisors as either professional, managerial or confidential.

As an initial matter, the Authority presented the testimony of an accounting consultant as an expert to establish that, in the expert's opinion, the Financial Assistant to the Director position needs to be professional, managerial and confidential. The Authority offered the expert's opinion concerning the qualifications and skills required of an internal financial employe capable of preparing financial reports for a governmental entity subject to external audits to comport with recent changes in accounting practices in the wake of the Enron debacle. However, the Authority's reasons for creating or changing a position are not relevant to the examiner's determination as to whether the position is included in the bargaining unit. Also, the expert's opinion regarding the necessary education, skills and job functions of such a position is equally irrelevant to the examiner's legal determination. The unit status of the position in question is a legal conclusion for the examiner and the Board; it is not based on outside expert opinion. This legal determination requires that the examiner consider the actual job duties of the position, not the Authority's reasons for creating it or the proposed job duties contained in the written job description. Therefore, after thoroughly reviewing the testimony of the Authority's expert, the examiner disregards that testimony in its entirety as irrelevant to the factual and legal issues presented in the Authority's petition.

As the party seeking the exclusion, the Authority has the burden of proving the necessary factual elements to support the exclusion. In the Matter of the Employees of State System of Higher Educ., 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999). The Board will only consider actual job duties performed and will only consider written job descriptions to corroborate testimony of actual job duties. In the Matter of the Employees of Elizabeth Township, 33 PPER 33053 (Final Order, 2002). Written descriptions alone are not substantial, competent evidence of job duties. Id. Moreover, the Board will only consider the job duties that were performed prior to the filing of the petition. Post-petition job duties are not relevant to supporting the petition as a matter of law. "This policy is designed to deter an employer from assigning activities to an employe after a petition is filed simply to create the appearance that the employe should be excluded from the unit." Id. at 112.

Section 301(7) of PERA contains the definition of a professional employe:

"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). The Authority failed to satisfy the third prong of the professional employe standard with evidence of pre-petition job duties.

The Board has held that a degree from an institution of higher learning is required for an employe to be professional within the meaning of the statute, although the Board has recognized associate degrees below the bachelor degree level. In the Matter of the Employees of Lackawanna Career Technology Center, 33 PPER ¶ 33201 (Final Order, 2002). Moreover, an inquiry into the educational level of a person holding the position in question focuses on whether a degree from an institution of higher learning is required training to perform the duties of the position. In Lackawanna, the Board reiterated its position that "[i]t is significant to note in this regard that Section 301(7) does not focus on whether the employer requires a degree of any sort but rather whether the work to be performed requires a degree in the discipline as a requirement to perform that work.'" Id. at 471 (quoting In the Matter of the Employees of State System of Higher Educ., 28 PPER ¶ 28046 at 99 (Final Order, 1997)).

This record fails to demonstrate that, prior to the filing of the petition, any of the individuals who held either the position of Assistant to the Director or the Financial Assistant to the Director possessed any training or education from an institution of higher learning. Indeed, Ms. Marterella, the only employe who held the Financial Assistant to the Director position prior to the petition, testified that she did not have a four-year bachelor degree from an institution of higher learning or the five years of accounting or supervisory experience, as purportedly required by the written job description. The record lacks substantial evidence establishing that a degree from an institution of higher learning in a particular discipline is necessary training to perform the duties of the Financial Assistant to the Director. Accordingly, the Financial Assistant to the Director is not a professional employe position.

The Authority also seeks to have the position of Financial Assistant to the Director removed from the unit as managerial. Section 301(16) of PERA provides as follows:

(16) "Management level employe" means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision.

43 P.S. 1101.301(16). The Commonwealth Court held that, pursuant to this Section, an employe will be managerial if any one of the following three factors are established: (1) the employe is involved directly in the determination of policy; (2) the employe directs the implementation of policy; or (3) the employe is above the first level of supervision. Pennsylvania Ass'n of State Mental Hosp.

Physicians, 554 A.2d 1021, 1023 (Pa. Cmwlth. 1989). See also, Lackawanna, supra.

An employe who is directly involved with the determination of policy is one who meaningfully participates in the decisional process or possesses statutory authority to make final determinations. In the Matter of the Employes of Commonwealth of Pennsylvania (Attorney Examiners 1), 12 PPER 12131 (Final Order, 1981). The Board has interpreted the policy determination part of the test as including not only an individual who "has the authority or responsibility to select among options and put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect." In the Matter of the Employes of Horsham Township, 9 PPER ¶ 9157, at 327 (Final Order, 1978). The Horsham Board also held that employes involved in policy implementation are those persons responsible for "giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to ensure completion of the task." Id. The Board added that "there will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy." Id.

As the only pre-petition Financial Assistant to the Director, Ms. Marterella could not generally perform the following job duties included on the written job description for that position: she could not plan supervise and organize accounting, fiscal programs, records and activities; she could not assist in the development of annual budgets in coordination with plant superintendents; she could not prepare and forward bills to municipalities regarding bulk water and/or sewer accounts; she could not manage aspects of payroll such as time keeping and tax reporting; she could not maintain fixed assets reporting and related depreciation schedules; she could not process insufficient funds checks; she could not administer insurance policies, evaluate coverage and costs, analyze usage, meet and negotiate with insurance agents, supply agents with required information and develop uniform renewal dates; and she could not perform financial work.

Ms. Marterella's duties were routine and clerical in nature. She is not directly involved with determining fiscal or other policies for the Authority. She also did not implement policy by concrete measures. The record does not show whether Ms. Marterella at any time changed procedures or methods of operation. Although Ms. Marterella possesses extensive knowledge and skill in accounting, administration and office practices, as well as the capability to navigate through computer programs and develop spreadsheets, the Authority did not present specific facts that her particular duties as the Financial Assistant to the Director were in the nature of direct involvement with policy determination or implementation.

The Authority also claims that the position of Financial Assistant to the Director is confidential with the meaning of PERA. Section 301(13) of the PERA states the following:

"Confidential employe" shall mean any employe 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."

43 P.S. 1101.301(13).

The Authority created the position of Financial Assistant to the Director, by combining the Assistant to the Director position with the Fiscal Administrator position. Therefore, the job duties of the Assistant to the Director are now part of the job duties of the Financial Assistant to the Director. In this case the record reveals that when Ms. Keyser was the Assistant to the Director, she was "more or less, the notetaker, typing the notes for [the Director]," regarding contract negotiations. When Ms. Ferris was the Assistant to the Director, she was an active participant in contract negotiations on behalf of management on the same team as the Director. The record does not reveal whether Ms. Keyser was anything more than an amanuensis at the negotiation sessions while she was

the Assistant to the Director. However, Ms. Ferris was part of management's negotiation team and spoke on behalf of management during negotiations. Accordingly, the position of Financial Assistant to the Director is "confidential" within the meaning of Section 301(13) of PERA, and the position must be excluded from the bargaining unit.

CONCLUSIONS

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

1. The Authority 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.
4. The position of Financial Assistant to the Director is a confidential position and is thereby properly excluded from the bargaining unit.
5. The appropriate unit for the purpose of meeting and discussing wages, hours and terms and conditions of employment is a subdivision of the employer unit comprised of all full-time and regular part-time first level supervisors including but not limited to water plant supervisor, waste water treatment plant operator, office supervisor for the Authority, and assistant water supervisor; and excluding the Financial Assistant to the Director, supervisors above the first level of supervision, management level employes, confidential employes and guards as defined in PERA [the 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 first level supervisors certified by the Board at PERA-R-81-596-E is amended to exclude the Financial Assistant to the Director as a confidential employe.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this eighteenth day of June, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner