

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :
 : Case No. PERA-U-09-440-E
 : (PERA-R-793-C)
 :
 ABINGTON HEIGHTS SCHOOL DISTRICT :

FINAL ORDER

The Abington Heights School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on August 13, 2010, challenging a Proposed Order of Unit Clarification (POUC) issued on July 28, 2010. In the POUC, the Board's Hearing Examiner granted the Petition for Unit Clarification filed by the Abington Heights Education Association (Association) and determined that the position of Behavioral Specialist Consultant/Behavioral Analyst (Behavioral Specialist) should be included in the Association's professional bargaining unit. On August 27, 2010, the Association filed a timely response to the District's exceptions. Pursuant to an extension of time granted by the Secretary of the Board, the District filed its brief in support of exceptions on September 30, 2010. On October 19, 2010, the Association filed a brief in opposition to the District's exceptions.

The Hearing Examiner's findings of fact are summarized as follows. The position of Behavioral Specialist was created in September of 2008, and filled that month by David Bechtel. Mr. Bechtel's areas of expertise include student behavioral issues and agency counseling. As part of his duties, Mr. Bechtel oversees and reviews the District's social worker, offering suggestions on treating and analyzing student behavioral issues. Mr. Bechtel provides similar services to the District's classroom teachers. Mr. Bechtel also meets with the social worker to explain the social worker's duties, ensures that the social worker has the equipment and information necessary to do his job, and monitors that the social worker completes his work in a timely manner. Mr. Bechtel has never evaluated the social worker, and the social worker has never been evaluated by the District. At the direction of Sam Sica, the District's Director of Special Education and Mr. Bechtel's immediate supervisor, Mr. Bechtel once gave the social worker a verbal reprimand, after Sica received a parental complaint about the social worker. Mr. Bechtel does not possess an Act 93 Supervisor Certificate, nor is one required in his job description.

According to Mr. Bechtel, he developed a mental health policy for mental health workers who visit the District's buildings. That policy was developed in either October or November of 2008. It has yet to be adopted by the District. At Sica's request, Mr. Bechtel developed a student behavior policy. That policy deals with Mr. Bechtel's area of expertise. This policy largely parroted state statutory and regulatory requirements, which teachers were already following. Mr. Bechtel did not attend the school board meeting when the policy was adopted and played no role in recommending or presenting the policy to the school board.

Mr. Bechtel, drawing on his professional expertise, conducted in-service trainings for teachers and developed behavior support plans and restraint procedures. Mr. Bechtel made up a draft budget for crisis management training which included such items as supplies, costs for substitute teachers and training costs. After preparing this draft, Mr. Bechtel gave it to Sica, who prepares the strategic budget for the District. Mr. Bechtel does not know how the budget procedure works in the District.

Mr. Bechtel acts as liaison with local mental health agencies and completes certain documents about students' progress necessitated by Department of Education regulations. He also works with kindergarten through twelfth grade special education teachers.

In the POUC, the Hearing Examiner determined that the position of Behavioral Specialist is neither supervisory nor managerial under the Public Employee Relations Act (PERA) and is therefore properly included in the bargaining unit. As to the supervisory exclusion, the Hearing Examiner determined that the District failed to show that Mr.

Bechtel spends any time supervising the District's social worker. As to the managerial exclusion, the Hearing Examiner concluded that Mr. Bechtel's policy formulations were the consequence of his professional expertise rather than an indication of any overarching managerial authority. Accordingly, the Hearing Examiner granted the Association's Petition for Unit Clarification.

In its exceptions, the District alleges that the Hearing Examiner erred by finding that the position of Behavioral Specialist is neither supervisory nor managerial. In its response to the exceptions, the Association argues that the District's exceptions should be dismissed because they do not comply with Section 95.98 of the Board's Rules and Regulations, which requires exceptions to be sufficiently specific so as to permit meaningful review.

Section 95.98(a) (1) of the Board's Rules and Regulations provides, in relevant part, as follows:

The statement of exceptions shall:

(i) State the specific issues of procedure, fact or law, or other portion of the proposed decision to which each exception is taken.

(ii) Identify the page or part of the decision to which each exception is taken.

(iii) Where possible, designate by page citation or exhibit number the portions of the record relied upon for each exception.

(iv) State the grounds for each exception.

34 Pa. Code § 95.98(a) (1) (i)-(iv). As the Board recently reaffirmed in Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 84 (Final Order, 2010), pursuant to Section 95.98(a) (1) of the Board's Rules and Regulations, the Board will not consider exceptions that are not sufficiently specific so as to permit meaningful review of a particular assignment of error in fact or law. FOP, Conference of Pennsylvania Liquor Control Board Lodges v. Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement, 30 PPER ¶ 30164 (Final Order, 1999), *aff'd sub nom. FOP, Conference of Pennsylvania Liquor Control Board Lodges v. PLRB*, 751 A.2d 726 (Pa. Cmwlth. 2000). However, the Board will address any issue in the exceptions that has been further elaborated on in a brief simultaneously filed with the exceptions. Bureau of Liquor Control Enforcement, supra; Conrad Weiser Education Association v. Conrad Weiser School District, 28 PPER ¶ 28050 (Final Order, 1997); Edwardsville Firefighters Local #840 v. Edwardsville Borough, 27 PPER ¶ 27109 (Final Order, 1996).

Here, the District's exceptions only state that "[t]he decision of the Hearing Examiner that the position of Behavioral Specialist is neither supervisory or managerial within the meaning of Section 110.301(6) and/or Section 1101.301(16) of the PERA is arbitrary and capricious and erroneous as a matter of law and is not based on substantial evidence." Thus, as in Pennsylvania State Troopers Association, the exceptions only state the standard of review, but do not state any grounds for the exceptions. Further, as in Pennsylvania State Troopers Association, the District's brief cannot remedy the lack of specificity in the exceptions because it was not filed simultaneously with the exceptions. See id.

The Commonwealth Court recently reaffirmed its position in this regard with respect to petitions for review filed pursuant to its appellate jurisdiction. In Maher v. Unemployment Compensation Board of Review, 983 A.2d 1264 (Pa. Cmwlth. 2009), appeal denied, ___ Pa. ___, 996 A.2d 493 (2010), a petition for review that merely restated the Commonwealth Court's standard of review and did not address the petitioner's arguments on the merits of his appeal was dismissed for failure to comply with Pa. R.A.P. 1513(d) requiring "a general statement of the objections to the order or other determination." The petition for review failed to raise or preserve any specific issue for appellate

review because it simply stated that the decision of the Unemployment Compensation Board of Review is not supported by substantial evidence and is based on errors of law. The Commonwealth Court will similarly not "consider issues raised in a party's brief that are not sufficiently addressed in the petition for review." *Id.* at 1266. Similarly here, the District's statement of exceptions fails to raise or preserve any specific issue for the Board's review by merely parroting the standard of appellate review of a Board order and stating that the Hearing Examiner's decision is arbitrary and capricious and erroneous as a matter of law, and is not supported by substantial evidence. Thus, the Association's motion to dismiss the District's exceptions is granted.

Even if the Board were to consider the arguments in the District's brief in support of exceptions, it would not prevail in this matter. First, as to the District's exceptions regarding the supervisory exclusion, Section 301(6) of PERA defines supervisor as follows:

(6) "Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6). In Luzerne County Community College, 37 PPER ¶ 47 (Final Order, 2006), the Board stated:

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983). It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, "may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employes who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 462 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 568 Pa. 675; 795 A.2d 984 (2000); State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532, 532 (Pa. Cmwlth. 1980). Conversely, where the employe performs predominantly supervisory duties, that employe is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975).

37 PPER at 148.

As support for its argument that Mr. Bechtel is a supervisor because he has the power to discipline other employes, the District relies upon a single incident where Mr. Bechtel verbally reprimanded the District's social worker. However, as noted by the Hearing Examiner, the Board has previously held that a single instance of verbal counseling is not sufficient to establish supervisory status under Section 301(6). See Penns Manor Area School District, 30 PPER ¶ 30198 at 430. Moreover, Mr. Bechtel only issued the verbal reprimand at the request of his immediate supervisor (Mr. Sica), and thus did not independently impose discipline or effectively recommend such action.

The District further argues that the Hearing Examiner ignored certain facts regarding supervisory duties performed by Mr. Bechtel. Specifically, the District argues that the Behavioral Specialist provides administrative and clinical supervision to the social worker, developed the job description for the social worker and the referral process for students going to the social worker, oversees cases given to the social worker and gives clinical suggestions and recommendations regarding treatment. However, absent evidence that Mr. Bechtel spends a majority of his time performing such duties, this is not sufficient

evidence to show that the position of Behavioral Specialist should be excluded as supervisory under Section 301(6). Luzerne County Community College. Because the District failed to produce such evidence, the Hearing Examiner correctly concluded that Mr. Bechtel should not be excluded from the bargaining unit as a supervisor.

With regard to the managerial exclusion, the District argues that the policies developed by Mr. Bechtel go beyond his area of technical expertise and, instead, have a direct impact on management policy formulated by the District. Section 301(16) of PERA defines management level employe as "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 burden of proving the management level exclusion is on the party seeking the exclusion. School District of Philadelphia v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998). In West Penn Township, 37 PPER ¶ 120 (Final Order, 2006), the Board stated that:

In Commonwealth of Pennsylvania (Attorney Examiners), 12 PPER ¶ 12131 (Final Order, 1981), the Board interpreted Section 301(16) of PERA in the following fashion:

The Statute may be read to state a three-part test in determining whether an employe will be considered managerial. Those three parts are (1) any individual who is involved directly in the determination of policy; (2) any individual who directs the implementation policy; or (3) employes above the first level of supervision.

12 PPER at 203.

In Horsham Township, 9 PPER ¶ 157 (Final Order, 1978), the Board interpreted the policy formulation part of the test of management level status as follows:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to 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. Our reading of the Statute does not include a person who simply drafts language for the statement of policy 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.

9 PPER at 327.

The Board went on in Horsham Township to discuss the second part of the test for management level status, i.e.: policy implementation, to include the following:

...[T]hose persons who have a responsible role in 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. The administration of policy involves basically two functions: (1) observance of the terms of the policy, and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine ministerial function. 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. Accordingly, in order to be excluded from a unit as a management level employe under PERA, the employe must either engage in meaningful participation

in development of the employer's policy, or must ensure fulfillment of that policy by concrete measures.

37 PPER at 397.

With regard to the distinction between policies developed as the result of technical expertise of a professional employe and policies developed as a result of managerial authority, the Board was confronted with this same issue in Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988), and stated:

The National Labor Relations Board (NLRB) has addressed cases in which professional employes are alleged to also be managerial and the NLRB has held that judgments of professional employes 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. General Dynamics Corp., 1013 NLRB 851 (1974). In Montefiore Hospital and Medical Center, 110 LRRM 1048 (1982), the NLRB stated as follows:

As professional employes, the doctors may also be managerial, but their managerial status may not be based on decisionmaking which is part of the routine discharge of professional duties. **Only if the activities of professional employes fall outside the scope of the duties routinely performed by similarly situated professionals will they be found aligned with management.** And in the health care context the Board must evaluate the facts of each case to determine whether decisions alleged to be managerial or supervisory are incidental to the professional's treatment of patients.

110 LRPM at 1050 (footnote omitted). The Nurse Practitioner's participation in the formulation of medical protocols is part of the routine discharge of the Nurse Practitioner's professional duties. The Nurse Practitioner's participation in the formulation of protocols is a result of her professional expertise and is not indicative of managerial authority.

Id. at 378 (emphasis added).

The job of the Behavioral Specialist involves treating and analyzing student behavioral issues. The testimony accepted by the Hearing Examiner and the findings of fact based on that testimony indicate that any policies formulated by Mr. Bechtel are a result of his professional expertise and training and are not indicative of any overall managerial authority over the policies and procedures of the District. Rather, the evidence accepted as credible by the Hearing Examiner indicates that managerial authority with regard to the student behavioral policies of the District instead lies with the Director of Special Education. Indeed, the student behavioral policy upon which the District places substantial reliance not only falls within Mr. Bechtel's professional expertise, but was drafted at the behest of the Director of Special Education. Therefore, the drafting of this policy does not make Mr. Bechtel a manager.¹

The District also posits that Mr. Bechtel's implementation of policy is sufficient to support a finding that he is managerial, and points to his implementation of a physical restraint program as support for this argument. However, the Board's rule regarding professional expertise applies equally to policy implementation and policy formulation. See City of Lebanon, 4 PPER ¶ 24 at 26 (Order and Notice of Election, 1974) (policy formulation and implementation must be distinguished from technical expertise). Thus, because the District failed to show that the implementation of this program fell outside the scope of Mr. Bechtel's professional expertise, his implementation of this program does not give him the status of a management level employe under PERA.

¹ The other policy upon which the District relies concerning mental health was never adopted by the District and thus also fails to demonstrate managerial status.

The District also argues that Mr. Bechtel has the kind of budgetary authority which elevates his position to the status of a management level employe. Specifically, the District asserts that Mr. Bechtel has the authority to commit District expenditures in a manner which is discretionary and not routine. However, although Mr. Bechtel gave a draft budget to the Director of Special Education, the evidence shows that at that point Mr. Bechtel was removed from the budgetary process. The Board will not find employes who only act as resource persons or make suggestions with the budget to be managerial. See Philadelphia Housing Authority, 23 PPER ¶ 23062 (Final Order, 1982), aff'd, 23 PPER ¶ 23218 (Court of Common Pleas of Philadelphia County, 1992); William Penn School District, 29 PPER ¶ 29151 (Proposed Order of Unit Clarification, 1998).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the District's exceptions and make the Proposed Order of Unit Clarification final.

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the District are hereby dismissed, and the July 28, 2010 Proposed Order of Unit Clarification be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of February, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.