

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :
: :
: PERA-U-14-354-E
: (PERA-R-92-701-E)
MIDD-WEST SCHOOL DISTRICT :

FINAL ORDER

The Midd-West School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on November 9, 2015, challenging a Proposed Order of Dismissal (POD) issued on October 19, 2015.¹ In the POD, the Hearing Examiner determined that the District failed to sustain its burden of establishing that the position of Administrative Secretary - Payroll/Tax Collection must be excluded from the certified bargaining unit as a confidential employe within the meaning of Section 301(13) of the Public Employe Relations Act (PERA). The Midd-West Education Support Professionals Association (Association) filed a response to the exceptions and a brief on November 23, 2015. Following a hearing held on June 8, 2015, at which time both parties were afforded a full opportunity to present testimony and documentary evidence, the Hearing Examiner made Findings of Fact that are summarized as follows.

The Association is the exclusive bargaining agent for a unit described as "all full-time and regular part-time nonprofessional employees including but not limited to aides, secretaries, custodial/maintenance employes and cafeteria employes; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act". The Administrative Secretary - Payroll/Tax Collection position (payroll secretary) has been included in the bargaining unit as a secretarial position. On October 30, 2014, the District filed a Petition for Unit Clarification with the Board seeking to exclude the payroll secretary from the bargaining unit as a confidential employe.

At the time of filing of the Petition for Unit Clarification, the position of payroll secretary was vacant. The previous payroll secretary was Robin Kauffman, who worked for the District for approximately 35 years before she retired in August 2014. The current payroll secretary is Christine Edmiston, who was hired after the filing of the Petition for Unit Clarification.

The District's business manager, Lynn Naugle, is on the District's bargaining team and has an office that adjoins the payroll secretary's office. As payroll secretary, Kauffman served as an administrative assistant to the business manager for approximately ten

¹ The District's exceptions are timely because November 8, 2015, the twentieth day following issuance of the POD, was a Sunday and is therefore omitted from computation of the twenty-day period for filing of exceptions. 34 Pa. Code §95.100(b).

years.² Kauffman was responsible for keeping track of employees' eligibility for insurance, such as medical benefits and dental plans, as well as retirement. Because Kauffman was already collecting data annually to prepare a benefits sheet for each employee, Naugle had Kauffman prepare spreadsheets, which contained names, positions, current salary, hours worked, and insurance premiums and contributions for Naugle's use in collective bargaining negotiations.

"Confidential employees" are excluded from collective bargaining units established under PERA, and are defined by Section 301(13) as follows:

"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.

43 P.S. § 1101.301(13). The burden of proving whether a position is confidential within the meaning of Section 301(13) of PERA lies with the party seeking to exclude the position from the bargaining unit. Westmoreland County v. PLRB, 991 A.2d 976 (Pa. Cmwlth. 2010), *petition for allowance of appeal denied*, 17 A.3d 1256 (Pa. 2011). Thus, the District had the burden to establish through substantial, credible evidence that the payroll secretary either (i) works in the personnel office and has access to information used by the public employer in collective bargaining; or (ii) works in a close continuing relationship with the business manager, who is associated with collective bargaining on behalf of the District. See North Hills School District v. PLRB, 762 A.2d 1153 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 781 A.2d 150 (Pa. 2001).

With regard to Section 301(13)(i), the Board has long held that for purposes of confidential status under Section 301(13)(i), the "personnel office" extends only to "those offices of the public employer in which central personnel recordkeeping functions are performed..." Bangor Area School District, 9 PPER ¶9295 at 532 (Nisi Decision and Order, 1978). Here, the Hearing Examiner found that "the District's personnel files are housed in the superintendent's office, which is not on the same floor as the payroll secretary's office." (FF 8).³ Thus, on this record, the payroll secretary does not work in the District's personnel office, and cannot be a confidential employee under Section 301(13)(i) of PERA.

Nevertheless, the District argues on exceptions that the payroll secretary is privy to confidential collective bargaining information sufficient to satisfy the second criterion under Section 301(13)(i) of PERA. In this regard, the District argues that the information culled by Kaufmann for Naugle's use in negotiations was available to the

² Another secretary (the accounts payable secretary) also serves as an administrative assistant to the business manager.

³ No exception to Finding of Fact 8 has been raised by the District. See 34 Pa. Code §95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

public only upon request through the superintendent or the business manager, and thus Kaufmann had access to confidential information used by the public employer in collective bargaining within the meaning of Section 301(13)(i) of PERA. However, as the Hearing Examiner properly noted, the mere compiling of public information is not sufficient to establish the second criterion under Section 301(13)(i) of PERA. In Bangor Area School District, *supra*, the Board stated as follows:

The second criteria of sub-part (i) is 'an employe who has access to information subject to use by the public employer in collective bargaining.' Our Commonwealth Court recently determined in Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. PLRB, 383 A.2d 546 (1978), that an employe who had access to personnel records and fiscal information such as budgets, proposed allocations of funds toward the employer's programs, salaries, and memoranda concerning proposed salary increments to specific employes was not a 'confidential employe' under the first test of Section 301(13) of the Act since the employe enjoyed no access to information subject to use by the employer which could be considered outside the 'public record.' The Board has similarly held that an employe does not have access to confidential collective bargaining information when (s)he simply takes basic data and compiles reports which may eventually be used in negotiations as the position of the employer when the person who compiles the basic data has no information which would be considered confidential as a result of that compilation. It is only when an employe is privy to the relevant determinations of the employer's policy that that person may be found to be confidential. The collective bargaining information must be of such a definite nature that the union would know of the employer's plans if said information is revealed. See West Jefferson Hills School District, 5 PPER 65 (1978); and Northgate School District, 9 PPER ¶ 9121 (1978).

Bangor Area School District, 9 PPER at 532-533.

As conceded by the District, the information Kaufmann used to compile her spreadsheet for Naugle is readily available to the public and the Association (albeit upon request to the business manager or superintendent). There is no evidence or testimony of record that in preparing the spreadsheet, Kauffman became privy to the District's bargaining proposals or strategy or any confidential information used by the District in collective bargaining.⁴ Accordingly, on this record, the District has failed to establish that, through her preparation of the spreadsheet for the business manager, Kauffman was privy to any of the District's confidential collective bargaining information for purposes of Section 301(13)(i) of PERA. Thus, for the reasons discussed above, the District has failed to establish that the payroll secretary is a confidential employe under Section 301(13)(i) of PERA.

⁴ Indeed, it is undisputed in the record that Kauffman sat across from Naugle at the bargaining table as a representative of the Association, even though she had prepared spreadsheets of compiled employe data for use by Naugle in those negotiations.

Establishing that a position is confidential under Section 301(13)(ii) requires proof that the position at issue works in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer. There are two elements that must be satisfied. First, it must be established that the public officer or employer representative is associated with collective bargaining on behalf of the employer. The Commonwealth Court explained in North Hills School District, *supra*, as follows:

[T]he focus [under Section 301(13)(ii)] is upon the level of association that the public officer or representative has with the employer's collective bargaining process. As interpreted by the PLRB, the exclusion under section 301(13)(ii) is limited to employees who work in a close continual relationship with "managerial personnel who actually participate in the collective bargaining in [sic] behalf of the public employer," Altoona Area School District, 480 Pa. at 155, 389 A.2d at 557, in other words, those who actually formulate, determine or effectuate the employer's labor policy. *Id.*

North Hills School District, 762 A.2d at 1159. There is no dispute on this record that Naugle, as the District's business manager, participates in the contract negotiations on behalf of the District. Accordingly, Naugle is a District representative associated with collective bargaining for purposes of the first element under Section 301(13)(ii) of PERA.

The second element under Section 301(13)(ii) focuses on the working relationship between that employer representative associated with collective bargaining and the employe sought to be excluded from the bargaining unit as confidential. The Commonwealth Court noted in Neshannock Educational Support Professionals Association v. PLRB, 22 A.3d 1103, 1107 (Pa. Cmwlth. 2011), that "employees that were found to have a 'close continuing relationship' under section 301(13)(ii) worked directly for members of the bargaining team and/or performed work related to collective bargaining on a regular basis." That statement is tempered by the labor policy underlying Section 301(13)(ii), as discussed by the Pennsylvania Supreme Court in PLRB v. Altoona Area School District, 389 A.2d 553 (Pa. 1978), as follows:

[T]he underlying policy of the PERA is best served by formulating a narrow test for confidential status, excluding from bargaining units only those employes closely associated with managerial personnel who actually participate in the collective bargaining in behalf of the public employer.

Altoona Area School District, 389 A.2d at 557.

To justify excluding an employe from the bargaining unit under Section 301(13)(ii), the employer must establish through competent evidence of the employe's actual duties that there is a "close continuing relationship" between the alleged confidential employe and the District's bargaining representative. North Hills School District, *supra.*; Neshannock, *supra.* Indeed, allowing mere supervisory status,

standing alone, to establish a confidential relationship would run afoul of the Supreme Court's discussion of labor policy in Altoona Area School District, in which the Court stated as follows:

It was not the purpose of § 1101.301(13)(ii) to exclude every employe even remotely "associated with" collective bargaining, from the janitorial employes who clean up after negotiation sessions to the employes who keep the negotiators supplied with coffee, drinking water and sharpened pencils. To the contrary, when we consider the purpose of the PERA, it becomes clear that the section is far more amenable to the interpretation given it by the Board -- limiting the exclusion to those [employes] who work in a close continual relationship with managerial employes who actually formulate, determine or effectuate the employer's labor policy.

Altoona Area School District, 389 A.2d at 557. Moreover, a confidential exclusion based solely on who is the employe's supervisor, without evidence of the duties performed for that supervisor, would be contrary to the Board's long-standing labor policy of precluding the scattering of confidential duties among the bargaining unit. See Cheltenham School District, 32 PPER ¶32098 (Final Order, 2001).

While the finding of a close continuing relationship under Section 301(13)(ii) may be based on the totality of the circumstances, merely because a particular employe is a subordinate to a member of the employer's bargaining team, standing alone, is insufficient to establish a close continuing relationship under Section 301(13)(ii) of PERA. There must be testimony or evidence of the employe's continuing duties for the employer's bargaining representative to justify assuming that the employe would, by sole nature of that relationship, have access to confidential collective bargaining information. North Hills School District, 762 A.2d at 1159; see also Commonwealth ex rel. Gallas v. PLRB, 636 A.2d 253 (Pa. Cmwlth, 1993), *affirmed*, 665 A.2d 1185 (Pa. 1995) (judicial secretaries and judicial tipstaves have a close continuing relationship with the judges, and thus are confidential employes under Section 301(13)(ii), because they are part of the judges' personal staff, are subject to discipline at the judges' discretion, and have complete access to the judges' personal chambers and files).

Indeed, in North Hills School District, Shirley Dougherty was the personal secretary of the district's assistant superintendent, Richard Santillo, who participated in collective bargaining on behalf of the district. The Commonwealth Court noted in that case that Dougherty was Santillo's only secretary, and the record evidence further established that Dougherty's duties for Santillo included proofreading, copying and shredding documents. On that record, the Court held that Dougherty had a close continuing relationship with Santillo, and thus was a confidential employe under Section 301(13)(ii) of PERA. On the other hand, in Neshannock, *supra.*, Gisela Arrow, the accounts payable clerk, reported directly to the business manager, who did not participate in collective bargaining for the district. However, during collective bargaining, the district's superintendent, Dr. Mary Todora, and the assistant superintendent, Dr. Kathleen Roppa, twice directed Arrow to prepare spreadsheets for their use in collective bargaining

negotiations. Although Arrow was a subordinate employe to the district's superintendent and assistant superintendent, the Court found that two instances of preparing reports for Drs. Todora and Roppa was insufficient to create a close continuing relationship. Further, there was no evidence that Arrow performed other duties directly for Drs. Todora or Roppa.⁵

The record in this case indicates that Kauffman's office was separated by a doorway from Naugle's office, and that Kauffman worked with Naugle for approximately ten years. However, there is no evidence that they had a close continuing working relationship. While Kauffman testified that she was one of two administrative assistants to Business Manager Naugle, there is no testimony that Kauffman performed any routine administrative duties directly for Naugle.⁶ Indeed, the record is devoid of testimony concerning any duties Kauffman performed for Naugle other than preparing a spreadsheet from records previously culled for other employes, and then only in those years when the District and Association were negotiating a collective bargaining agreement.⁷ Accordingly, because Kauffmann is not Naugle's only

⁵ Indeed, in Neshannock Education Support Professionals Association, the court distinguished Westmont Hilltop School District, 33 PPER ¶33067 (Final Order, 2002), by noting that in Westmont the payroll clerk worked closely with the business manager, who was a member of the district's bargaining team, in addition to providing the business manager with reports used in negotiations.

⁶ In addressing the composition of an appropriate bargaining unit upon consideration of a unit clarification petition, the Board relies on testimony of the actual duties performed by the employe, as opposed to the employer's written job description. Westmoreland County, *supra*. Furthermore, other than stating that the payroll secretary reports to the business manager and must obtain the business manager's approval to pay invoices from the Athletic and Activity Fund, the written job description for the payroll secretary position during Kauffman's employment does not specify those duties that she performed directly for the business manager. (Exhibits P-1, P-2). Additionally, the District offered no first-hand testimony by Naugle or Edmiston to corroborate an October 13, 2014 job description of the alleged revised duties for the payroll secretary. (Exhibit P-3).

⁷ On exceptions, the District argues that the Hearing Examiner erred in rejecting the testimony of Superintendent Richard Musselman regarding the duties of the payroll secretary position. Generally, the Board will not disturb the Hearing Examiner's credibility determinations absent the most compelling of circumstances. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). Here, Musselmann commenced his employment with the District a month before Kauffman retired and had no firsthand knowledge of her duties. Further, Musselman's testimony entailed describing what he believed the payroll secretary's duties should include based on the October 13, 2014 job description (Exhibit P-3), drafted when the payroll secretary position was vacant, but he was not personally aware of the actual duties performed by Edmiston, who was hired as the payroll secretary after the filing of the Petition for Unit Clarification. Accordingly, there are no compelling reasons warranting review of the Hearing Examiner's credibility determinations regarding Musselman's testimony.

secretary and there is no record evidence of any duties Kauffman performed directly for Naugle other than occasionally preparing personnel spreadsheets, the Hearing Examiner did not err in concluding that the District failed to sustain its burden of establishing that Kauffman worked in a close continuing relationship with Naugle, such that the payroll secretary position would be excluded from the bargaining unit as confidential under Section 301(13)(ii) of PERA. See North Hills School District, supra.; Neshannock Education Support Professionals Association, supra.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the District failed to establish that Kauffman, in the Administrative Secretary - Payroll/Tax Collection position, was a confidential employee requiring her exclusion from the bargaining unit under Section 301(13) of PERA. Accordingly, the District's exceptions shall be dismissed and the October 19, 2015 Proposed Order of Dismissal shall be made absolute and final.

ORDER

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 Midd-West School District are hereby dismissed, and the October 19, 2015 Proposed Order of Dismissal, 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, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this fifteenth day of December, 2015. 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.