

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : PERA-U-12-240-W  
 : (PERA-R-354-W)  
WATTSBURG AREA SCHOOL DISTRICT :

**PROPOSED ORDER OF DISMISSAL**

On August 9, 2012, the Wattsburg Education Association, PSEA/NEA (Association or Union) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to include the positions of ROTC Instructors and IT Client Technology Specialists in a unit of professional employes, certified by the Board at Case No. PERA-R-354-W.

On September 16, 2012, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating April 10, 2013, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary. A hearing was ultimately held April 10, 2013, before Hearing Examiner Jack Marino, Esq., at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The hearing on April 10, 2013, concerned the AFJROTC Instructors positions. An additional day of hearing was scheduled, but the Association and Wattsburg Area School District (District or Employer) settled the issue of the Client Technology Specialists prior to the second day of scheduled hearing. The Association filed a post-hearing brief in support of its position on January 8, 2014. The District filed a post-hearing brief in opposition to the Petition on February 7, 2014. This matter was reassigned to the undersigned Hearing Examiner on August 26, 2015.

The 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 within the meaning of PERA. (N.T. 8).
2. The Association is an employe organization within the meaning of PERA. (N.T. 8).
3. The District and the Air Force have an agreement to establish and maintain an Air Force Junior Reserve Officers Training Corp (AFJROTC) unit in the District. (Joint Exhibit 5).
4. Pursuant to agreement, the District agreed to employ at least two retired Air Force personnel to conduct Aerospace Science/Leadership Education courses and other AFJROTC activities at the District. (Joint Exhibit 5, page 4).
5. Raymond Oshop (Oshop) and James Johnson (Johnson) are the AFJROTC instructors at the District. (N.T. 27-28, 76).
6. Oshop applied for AFJROTC when he was aware there was a position available at Wattsburg. The Air Force advertised the position across the United States. Anyone who wanted to apply for the position had to send their information to Air Force headquarters to be evaluated for credentials relating to veteran status, background education, and career at the Air Force. It is a requirement to be retired from the Air Force to serve as a AFJROTC instructor. The Air Force then checks the qualifications of the applicants and presents a list of all qualified candidates to the District. The District may choose to interview any individuals on the list presented to them from the Air Force. Oshop received emergency certification from PDE once the District decided to hire him. (N.T. 28-29, 31, 41-43, 108).

7. Johnson is certified by the Air Force to be an AFJROTC and is also certified by PDE. (N.T. 76).
8. The arrangements between the District and the two AFJROTC instructors are memorialized in individual contracts with each of them. (N.T. 103).
9. Per agreement with the U.S. Air Force, the District must provide in the employment contract with the AFJROTC instructors the following provision:

To ensure retired personnel so employed receive at least "Minimum Instructor Pay (MIP)". "MIP" is defined as an amount equal to the difference between their entitled retired pay and the active duty pay and allowances, excluding hazardous duty and proficiency pay, which they would receive if performing Air Force active duty . . . . [T]he Air Force shall reimburse [the District] one half of MIP.

(Joint Exhibit 5, page 5).

10. The AFJROTC instructors are paid by the District pursuant to the MIP. (N.T. 65, 112).
11. The Air Force determines what the MIP is for each individual. (N.T. 113).
12. The District is reimbursed by the Air Force for 50% of the MIP. (N.T. 112).
13. The AFJROTC instructors teach lesson plans which are part of an Air Force curriculum. (N.T. 34-35, 64.)
14. Per agreement, the AFJROTC instructors are required to teach AFJROTC courses prescribed by the Air Force and may deviate from the prescribed curriculum only when specifically approved by the Air Force. (Joint Exhibit 5, page 3).
15. Per agreement, the District must provide an employment contract to the AFJROTC instructors which contain the following provision:

To ensure AFJROTC instructors perform only those duties connected with the instruction, operation, and administration of the AFJROTC program. Individuals employed as AFJROTC instructors will not perform duties or teach any classes in any discipline other than Aerospace science.

(Joint Exhibit 5, pages 5-6).

16. Oshop is observed by the principal or vice principal on a regular basis. Additionally, an agent of the Air Force observes Oshop once every three years. (N.T. 38-39).
17. Per agreement, the Air Force has the right to place AFJROTC instructors on probation for breach of Air Force standards. (Joint Exhibit 5, page 9).
18. AFJROTC instructors have certification from the Air Force to participate as a junior ROTC instructor which is separate from their certification from PDE. (N.T. 70-71).
19. Per agreement, the Air Force has the right to withdraw certification of AFJROTC instructors for breach of standards and the District will remove decertified personnel from the AFJROTC program. (N.T. 70; Joint Exhibit 5, page 9).

20. Per agreement, representatives from the Air Force may make visits to the District, both announced and unannounced, to evaluate the AFJROTC program and enforce compliance with Air Force standards. (Joint Exhibit 5, page 9).
21. Per agreement, the District has the right to terminate the employment of certified AFJROTC instructors in accordance with institutional rules and regulations. (Joint Exhibit 5, page 9).
22. The agreement between the District and the Air Force contains the following provision regarding termination of the program:

This agreement may be terminated at the completion of any institution year by either party, by giving one-year's notice, or sooner by mutual agreement.

(Joint Exhibit 5, page 9).

### DISCUSSION

In this matter the Union seeks a unit clarification to include two AFJROTC instructors into a bargaining unit of educational professional employees of the District. The District objects to this inclusion on the grounds that the AFJROTC instructors are jointly employed by the District and the Air Force and, therefore, that the Board's decision in **Harbor Creek School District**, 20 PPER ¶ 20187 (Final Order, 1989), is controlling.

The Board will not include employees of joint employers in a bargaining unit with employees who are employed by only one employer. An employment relationship exists when a party has the right to select an employee, the power to discharge him, and the right to direct both the work to be done and the manner in which such work shall be done. **Sweet v. PLRB**, 457 Pa. 456 (1974). In **Costigan v. Philadelphia Finance Department Employees, Local 696**, 462 Pa. 425 (1975), the Supreme Court held that when no single entity controls all of the terms of the employment relationship and two or more entities "exercise independent control over important conditions of the relation [which] are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, . . . both must be deemed employers for purposes of the Act." **Id.** at 435 (internal quotation marks omitted).

In **Harbor Creek**, the Board, following **Sweet** and **Costigan**, held that the hearing examiner properly concluded that a Naval Junior Reserve Officers' Training Corps (NJROTC) naval science instructor (NSI) could not be included in a unit of professional employees employed by the school district because the school district and the Department of the Navy were joint employers of the NSI. In **Harbor Creek**, the Board found in the record five factors to be determinative in concluding that both the Navy and the District control the terms and conditions of employment of the NSI. These five factors are summarized as follows:

1. The Navy provided the District with a list of qualified applicants and the District selected the NSI to be hired only from that list.
2. The District had no control over the compensation of the NSI as the NSI salary was set by law and the District was merely obligated to pay the salary and the Navy reimbursed the District for one-half of that amount.
3. The Navy and the District independently controlled the right to discharge the NSI and also the right to direct both the work and the manner in which the work is done.

4. The Navy set the requirements for the program's curriculum and facilities and both the Navy and the District independently evaluated the NSI.
5. Each entity had the right to terminate the NSI and also the right to discontinue the Junior Reserve Officers' Training Corps Program altogether.

Applying **Harbor Creek** to this matter, I find the application of Board precedent to this matter is proper and thus the AFJROTC instructors should not be included in the bargaining unit as requested by the unit clarification. The facts in this matter are very similar to **Harbor Creek** listed above. First, the Air Force provides the District with a list of qualified applicants and the District selects the AFJROTC instructor to be hired only from that list. In Oshop's case, he was the only candidate on the list. Second, the District is mandated by agreement to pay the AFJROTC instructors at least the MIP, which is defined by the Air Force. The Air Force's control over the minimum amount to be paid to the AFJROTC is a significant control over the terms and conditions of the AFJROTC instructor's employment. Further, the Air Force reimburses the District half of the MIP. Third, the Air Force and the District share in the right to discharge the AFJROTC instructors. The Air Force can remove the certification of the instructor which has a similar effect to discharging them, as the instructor may no longer teach without certification. Fourth, the Air Force controls the curriculum to be taught by the AFJROTC instructors and both the Air Force and the District have the right to evaluate the AFJROTC instructors. Fifth, the District and the Air Force have the right to discharge or decertify the AFJROTC instructors and, after notice, to discontinue the program.

The Union argues that **Harbor Creek** is not controlling in this matter. The Union argues that since the AFJROTC instructors are retired from the Air Force they have no permanent employment affiliation with Air Force. While it is true the AFJROTC instructors are retired from the Air Force, this factor is not relevant to the **Harbor Creek** analysis because the Air Force, through its agreement with the District, still controls significant terms and conditions of the AFJROTC's employment. The Union also argues that **Harbor Creek** is distinguishable because the agreement between the Air Force and the District contains specific language which explicitly states that the AFJROTC instructors are exclusive employees of the District and that "in no event shall the School District represent that such instructors and personnel as Air Force employees, agent, or contractors." (Joint Exhibit 5, page 6). Relying on such contract language however merely begs the question. Our courts and the Board have developed law and policy in this area which compels me to look beyond the common use of the term "employee" to determine through an examination of the actual control of the terms and conditions of employment whether "joint employment" exists in the specific sense used in PERA for unit clarifications. Thus, while such language in the agreement exists, I do not find it dispositive to this matter. The essential analysis is to determine if the two separate entities in question have control over bargainable terms and conditions of employment. **See Costigan** at 435. In this matter, while surface details are different from **Harbor Creek**, the essential truth of the Air Force's control over terms and conditions of employment remains.

Since the AFJROTC instructors are, pursuant to **Harbor Creek**, jointly employed by both the Air Force and the District, I do not reach the question of whether or not the AFJROTC instructors share a community of interest with other employees in the bargaining unit which the Union represents.

I therefore find that the inclusion of the AFJROTC instructors in the bargaining unit of educational professional employees in the district is not appropriate.

#### CONCLUSION

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

1. The Borough 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 AFJROTC instructors are jointly employed by the District and the Air Force.

**ORDER**

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

**HEREBY ORDERS AND DIRECTS**

that the Petition for Unit Clarification is dismissed.

**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 21st day of September, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner