

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF

:
:
:
:
:
:
:

Case No. PERA-U-14-385-E

LEHIGH COUNTY

PROPOSED ORDER OF UNIT CLARIFICATION

On December 5, 2014, SEIU Local 668 (Union) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employee Relations Act (PERA or Act) seeking to accrete the position of Drug and Alcohol Case Management Specialist (DA Specialist) into the bargaining unit of professional and nonprofessional employes at the Lehigh County (County) Child Welfare Bureau and the County Mental Health-Mental Retardation Bureau, certified at PERA-R-3737-C. On February 12, 2015, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on Friday, May 29, 2015, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and cross-examine witnesses. On October 1, 2015, the County filed its post-hearing brief. On November 9, 2015, the Union filed its post-hearing brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. The parties stipulated and agreed that the DA Specialist would share an identifiable community of interest with the employes in the bargaining unit, certified at PERA-R-3737-C, if determined not to be a management level employe under the Act.
4. The hierarchy of County Drug and Alcohol personnel is as follows, from top to bottom: (1) the Drug and Alcohol Administrator; (2) the Assistant Drug and Alcohol Administrator; (3) the DA Specialist; and (4) the Fiscal Tech (N.T. 10-11; 20-22)
5. Heather Moore was hired as the DA Specialist on August 4, 2011. Her position was created to account for and track the money spent on drug and alcohol treatment under new Commonwealth guidelines, as well as to obtain funding or insurance for County residents in need of drug and/or alcohol treatment. (N.T. 10-13, 25; County Exhibit 1)
6. There are three sources of funding for an individual's drug and/or alcohol treatment, beyond insurance. Those three sources are as follows: The state allocation to the County for Medical Assistance or Act 152; the state allocation to the County for HIS;¹ and the County's budgeted allocation from its own funds for treatment. Funding for treatment is determined by a client's income, their Medical Assistance or Act 152 eligibility, and insurance. Ms. Moore selects the appropriate funding source for county residents in need of treatment based on their personal insurance/financial circumstances, given the level of care determined by treatment assessment. (N.T. 15, 20-21, 23, 27, 39)
7. The County's Drug and Alcohol Department utilizes the Pennsylvania Client Placement Criteria. From that established criteria, Ms. Moore compares the treatment provider's assessment to the criteria to determine whether the County will pay for a County resident's treatment. (N.T. 16-17)

¹ The record does not provide the meaning of this acronym.

8. Ms. Moore collects forms and documents from the treatment providers that are necessary to submit for Medical Assistance applications. She follows up with those providers when documents are missing. From time to time, Ms. Moore may meet with personnel for a treatment provider to teach them about the forms required for Medical Assistance. (N.T. 18)
9. Ms. Moore authorizes services for treatment providers to treat clients. If an individual's personal circumstances disqualify them from all three funding sources, Ms. Moore has no authority to authorize treatment. The County requires clients to be County residents to qualify for treatment funding. In following the County's residency policy, Ms. Moore cannot approve funding for an individual who fails to meet the residency requirement or other required criteria. If an individual fails to qualify for funding, Ms. Moore must obtain approval from the Drug and Alcohol Administrator to secure funding. (N.T. 25, 27, 32)
10. Ms. Moore utilizes the Commonwealth's Star System, which is a database of approved treatment providers. Within the Star System, Ms. Moore can approve a treatment for a client with a provider. (N.T. 19)
11. Ms. Moore ensures that the treatment providers follow the policies enacted by the Drug and Alcohol Department. Ms. Moore enters data into the County's computerized tracking system, which alerts her when treatment providers are not in compliance with the requirement that clients receive an assessment within seven days from the initiation of in-patient treatment. (N.T. 31-32)
12. Ms. Moore does not have authority to suspend any funding to a provider, even if the provider fails to comply with the seven-day assessment policy for in-patient clients. (N.T. 32)
13. Ms. Moore cannot override a treatment provider's assessment. If Ms. Moore and a treatment provider are unable to mutually agree on a level of care, Ms. Moore must seek counsel and approval from her supervisor who would then determine the level of care. (N.T. 33-34)
14. Ms. Moore has more duties and responsibilities in the position of DA Specialist than when she first started in that position, but she does not have more authority. She approves treatment for more clients than when she started due to the learning curve of the job. (N.T. 36-37)
15. When a client misbehaves during treatment, the treatment provider may terminate treatment, not Ms. Moore. There are no financial reasons within Ms. Moore's duties that would result in a termination of treatment service to a client. (N.T. 44)

DISCUSSION

The Act encourages the inclusion of public employees in bargaining units. The policies of the Act seek to protect public employees by affording them the right to join a union and benefit from the fruits of collective bargaining. **Rome Township**, 40 PPER 54 (Order Directing Submission of Eligibility List, 2009). As the party seeking to exclude the position, (County's Post-hearing Brief at 4), the County has the burden to establish that the DA Specialist is a management level employee. **State System of Higher Education**, 29 PPER ¶ 29234 (Final Order, 1998), **aff'd**, 737 A.2d 313 (Pa. Cmwlth. 1999). The Board has held that, in unit determination cases under the Board's investigatory authority, the burden is one of persuasion and not a strict burden of proof. **Riverview Intermediate Unit # 6**, 37 PPER 106 (Final Order, 2006).

The County argues that the DA Specialist has "substantial control over funding and clinical decision-making and, therefore, the position is properly classified as a management position and does not belong within the bargaining unit." (County's Post-hearing Brief at 5). The County contends that Ms. Moore's testimony concerning her job duties is not credible or reliable. The County maintains that Ms. Moore down played her authority and responsibilities because, as she admitted during her testimony, she wants to be in the Union so she can have more opportunity to pursue other County positions and obtain a wage increase. (County's Post-hearing Brief at 5-9).

Section 301(16) of the Act provides that a “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 Board has held that a manager is either: an employe who directly determines policy, implements policy or is above the first-level of supervision. **Allegheny-Clarion Valley School District**, 41 PPER 21 (Final Order, 2010). There was no substantial, competent evidence proffered in this case relevant to establishing that Ms. Moore was involved in policy determination or that she was above the first level of supervision. The remaining issue is whether Ms. Moore responsibly directs the implementation of County policy with managerial discretion.

The Board has held that employes who implement policy within the meaning of the statutory definition are the following type of individuals:

[P]ersons 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.

Horsham Township, 9 PPER ¶ 9157 (order and Notice of Election, 1978).

The County argues that Ms. Moore was untruthful and not credible because she down-played her job duties as the DA Specialist to get into the unit. I disagree. Ms. Moore was no more biased in her testimony for wanting to be in the unit than Ms. George was biased for wanting to keep her out of the unit. Judging from the witnesses’ appearances, general bearing and conduct on the witness stand, demeanor and manner of testifying, candor and frankness and certainty with respect to detailed facts, I conclude that Ms. Moore was more credible than Ms. George, and I resolve all conflicts in evidence and testimony in favor of Ms. Moore. **Mid Valley Education Association v. Mid Valley School District**, 25 PPER ¶ 25138 (Final Order, 1994). Ms. George testified in terms of legal conclusions and terms of art about broad authority, potential authority, and purposes. Contrarily, Ms. Moore testified in detail about her actual, historical job duties and functions. For this reason, I also discredit Ms. George’s rebuttal testimony in its entirety.

Illustratively, Ms. George did not testify about specific duties, which were actually and historically performed by Ms. Moore, that could support a finding that Ms. Moore exercises managerial discretion with managerial authority. The Board makes unit determinations based on record evidence of actual job duties. **Washington Township Municipal Authority v. PLRB**, 569 A.2d 402 (Pa. Cmwlth. 1989); **Dormont Borough**, 41 PPER 66 Proposed Order of Unit Clarification, 2010). Ms. George testified that Ms. Moore “has the **ability** to override assessment processes and placing individuals directly straight into a detox services.” (N.T. 51). Ms. George’s testimony about Ms. Moore’s abilities does not constitute a historical fact or substantial competent evidence demonstrating actual job duties. Ms. George also testified that Ms. Moore has the ability to work and admit clients after hours and actually has worked after hours. (N.T. 51). However, working long hours to admit clients does not demonstrate the requisite managerial discretion or policy implementation. Indeed, it does establish that Ms. Moore applies established admission criteria and guidelines in a routine ministerial fashion.

Ms. George also testified that Ms. Moore “does have the **ability**.... [and] she does have the **authority**, solely herself, to override that level of care [that the treatment provider recommends].” (N.T. 52). Again, Ms. George’s testimony that Ms. Moore has “authority” to perform certain duties, absent corroborating historical facts, does not satisfy the Board’s standard requiring record evidence of actual job duties. Accordingly, Ms. George’s testimony does not support a finding that the position of DA Specialist

is a management level position for two reasons: (1) Ms. George's testimony is not as credible as the conflicting testimony of Ms. Moore; and (2) the testimony does not provide substantial evidence of actual job duties relating to managerial discretion.

It is clear on this record, that Ms. Moore follows pre-established policies and rules in a clerical and routine manner, like any other rank-and-file employe. Moreover, any clinical discretion in terms of assessments for treatment and level of treatment involves her professional, technical expertise and not managerial discretion. The Board and its examiners have consistently distinguished between managerial discretion and technical or clinical discretion in the following manner:

[P]olicy formulation and implementation must be distinguished from technical expertise. To define the problem and directly implement the proposed solution to a problem is not the same as performing a function within a known discipline with competence. The former has to do with policy and the latter deals with technical expertise.

Allegheny County, 47 PPER 4, 9 (Proposed Order of Unit Clarification, 2015). Indeed, Ms. Moore's background and expertise, which qualified her for the position, provides her with the technical background to make clinical judgements about treatment. Not all discretion is managerial. Otherwise, teachers nurses and professors could not be included in bargaining units. Moreover, following policy, as Ms. Moore does, is the responsibility of every employe, and it is routine and ministerial in nature. The record is devoid of any evidence establishing that Ms. Moore suspended or changed policies, procedures or methods of operation or that she sanctioned or effectuated such actions.

The evidence in this case demonstrates that Ms. Moore follows County and Commonwealth guidelines for matching funding with County residents seeking treatment. In authorizing treatment, Ms. Moore is not exercising any managerial discretion. She routinely obtains personal information and determines whether the individuals satisfy the criteria established Medical Assistance or the County for qualifying for those respective funding sources. If the person qualifies, Ms. Moore verifies that qualification, which verification results in funding for the individual. Ms. Moore cannot move money or authorize any financial source of funding for an individual's treatment unless the individual satisfies pre-existing criteria. The client's circumstances determine funding and funding sources, not Ms. Moore. She has not terminated treatment for lack of funding or obtained funding for someone who falls outside the established guidelines, without obtaining approval from her administrator.

In verifying residency, Ms. Moore has not and cannot approve funding for an individual who falls outside of the County's residency requirement or other required criteria. The record does not demonstrate that Ms. Moore exercises any managerial discretion in suspending or altering County or Commonwealth policies for determining qualifications for treatment funding. Her treatment approvals are routine. She is required to ensure that all documentation is in order for Medical Assistance funding and that treatment providers submit the proper documentation for Medical Assistance, which is ministerial. Ms. Moore does not have the discretion to suspend the requirement that those documents must be properly completed and submitted. Ms. Moore does not even have the ability or authority to suspend funding once treatment has started and funding has been approved. When Ms. Moore and a treatment provider are unable to agree on a level of care, Ms. Moore must obtain approval from her supervisor to determine the proper level of care that can be funded. Although the record shows that Ms. Moore has more duties than when she started, she does not have more authority and she certainly does not have any more discretion. Rather as she credibly testified, as she learned more about the job, she was trusted to handle more duties. Accordingly, Ms. Moore is not a management level employe and the position of DA Specialist is properly included in the bargaining unit.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.

2. SEIU Local 668 is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The position of Drug and Alcohol Case Management Specialist (DA Specialist) is NOT a management level employe within the meaning of Section 301(16) of PERA and is properly included in the bargaining unit certified at Case No. PERA-R-3737-C.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the petition for unit clarification is sustained and the unit certified by the Board at Case No. PERA-R-3737-C is hereby amended to include the position of Drug and Alcohol Case Management Specialist (DA Specialist).

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. 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 twenty-third day of August, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner