

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : Case No. PERA-U-12-240-W  
 : (PERA-R-354-W)  
WATTSBURG AREA SCHOOL DISTRICT :

**FINAL ORDER**

On August 9, 2012, the Wattsburg Education Association, PSEA/NEA (Association) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to include the Air Force Junior Reserve Officer Training Corps (AFJROTC) instructor and Client Technology Specialist positions in the bargaining unit of professional employees employed by the Wattsburg Area School District (District).<sup>1</sup> On September 6, 2012, the Secretary of the Board issued an Order and Notice of Hearing directing a pre-hearing telephone conference on October 16, 2012 and a hearing on April 10, 2013 before Hearing Examiner Jack Marino. The hearing was held as scheduled, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence regarding the AFJROTC instructor position.<sup>2</sup> The Association and the District filed post-hearing briefs on January 6 and February 7, 2014, respectively.

On August 26, 2015, this matter was reassigned to Hearing Examiner Stephen Helmerich. On September 21, 2015, Hearing Examiner Helmerich issued a Proposed Order of Dismissal (POD), concluding that the AFJROTC instructors are jointly employed by the District and the United States Air Force (Air Force) and therefore are properly excluded from the bargaining unit of professional employees of the District represented by the Association. On October 8, 2015, the Association filed timely exceptions to the Hearing Examiner's POD with the Board. The District filed its response to the exceptions on November 5, 2015. Pursuant to an extension of time granted by the Secretary of the Board, the Association timely filed a brief in support of the exceptions on November 6, 2015. The District filed a brief in response to the exceptions on January 4, 2016.<sup>3</sup>

The facts of this case are summarized as follows. The District entered into an agreement with the Air Force to establish and maintain an AFJROTC program. The District agreed to employ at least two retired Air Force personnel to conduct Aerospace Science/Leadership Education courses and other AFJROTC activities. James Johnson and Raymond Oshop are the AFJROTC instructors at the District. Mr. Johnson is certified by the Air Force and the Pennsylvania Department of Education. Mr. Oshop received emergency certification from the Department of Education when he was hired by the District.

The Air Force requires applicants interested in an AFJROTC instructor position to provide their information to its headquarters to be evaluated for credentials relating to veteran status, background education, and their career in the Air Force. After checking the qualifications of the applicants, the Air Force presents a list of all qualified candidates to the District. The District may only interview the individuals on the list provided by the Air Force.

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<sup>1</sup> On December 16, 1970, the Board certified the Association as the exclusive bargaining representative for all "teachers, nurses, librarians and guidance counselors."

<sup>2</sup> A second day of hearing was scheduled for November 20, 2013, in order for the parties to present evidence concerning the Client Technology Specialist position. On November 19, 2013, the hearing was cancelled due to the parties' settlement of their dispute regarding that position.

<sup>3</sup> Pursuant to the extension granted by the Secretary, the District's brief was due on December 30, 2015. However, the District did not provide any independent, third party evidence of timely deposit accepted by the Board, such as a United States Postal Service Form 3817, United States Postal Service postmark or postmark cancellation, or overnight courier's shipping documentation. **See Lancaster County**, 45 PPER 94 (Final Order, 2014). The Board does not accept a private postal meter stamp as evidence of timely deposit in the mail, or submission of a brief by electronic means. Therefore, the District's brief was not timely filed and was not considered by the Board.

The District is required to pay the AFJROTC instructors at least the Minimum Instructor Pay (MIP) calculated by the Air Force for each individual instructor, which is "an amount equal to the difference between [the AFJROTC instructor's] 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." The Air Force reimburses the District for 50% of the MIP.

The AFJROTC instructors are required to teach AFJROTC courses that are part of the Air Force curriculum. The AFJROTC instructors may only deviate from the prescribed curriculum if they receive Air Force approval. The District's principal and vice principal observe the AFJROTC instructors on a regular basis. The Air Force observed Mr. Oshop once in a three year period. Representatives from the Air Force may make announced or unannounced visits to the District to evaluate the AFJROTC program and enforce compliance with Air Force standards.

The Air Force has the right to place AFJROTC instructors on probation for breach of its standards. AFJROTC instructors have certification from the Air Force to participate as an instructor in the AFJROTC program, which is separate from their certification from the Department of Education. The Air Force has the right to withdraw certification of AFJROTC instructors for breach of its standards and the District will remove decertified personnel from the AFJROTC program. The District has the right to terminate the employment of certified AFJROTC instructors in accordance with institutional rules and regulations. Either party may choose to discontinue the District's AFJROTC program at the completion of any institution year.

In the POD, the Hearing Examiner concluded that the Air Force controls significant terms and conditions of the AFJROTC instructors' employment thereby making it a joint employer of that position. Accordingly, the Hearing Examiner held that the AFJROTC instructor position is excluded from the bargaining unit of professional employes of the District and dismissed the Association's Petition for Unit Clarification.<sup>4</sup>

In **Sweet v. PLRB**, 457 Pa. 456, 322 A.2d 362 (1974), the Pennsylvania Supreme Court determined that an employer-employee relationship exists where "a party has the right to select the employe, 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." 457 Pa. at 462, 322 A.2d at 365. The Court further noted that the duty to pay an employe's salary is an indicator of employer status but it is not solely determinative of that status. **Id.** The Court refined this analysis in **Costigan v. Philadelphia Finance Department Employees Local 696**, 462 Pa. 425, 341 A.2d 456 (1975), where it found a joint employer relationship was present because no single entity controlled all the terms and conditions of employment of the employes at issue.

Indeed, there is no dispute that the District is an employer of the AFJROTC instructors. Therefore, the question presented pursuant to **Sweet** and **Costigan**, is whether the Air Force controls terms and conditions of the AFJROTC instructors' employment, thereby making it a joint employer of that position. The Board first decided this issue in **Harbor Creek School District**, 20 PPER ¶ 20187 (Final Order, 1989). In that case, the union sought to include the Naval Science Instructor (NSI) position for the district's Naval Junior Reserve Officer Training Corps program in the professional bargaining unit. The Board applied the standards set forth in **Sweet** and **Costigan** and concluded that the Navy was a joint employer of the NSI position, stating, in relevant part, as follows:

The record reveals that both the Navy and the District independently control the terms and conditions of employment of the NSI. As pointed out by the Hearing Examiner, the Navy provides the District with a list of qualified applicants and the District may select the person to be hired only from that list. Contrary to the assertion of the Association, this process is not

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<sup>4</sup> Because the Hearing Examiner concluded that the AFJROTC instructor position is excluded from the bargaining unit, he did not make a determination on whether the position shares a community of interest with the other positions in the unit.

akin to the Pennsylvania State Education Association (PSEA) referring individual applicants to the school districts across the state, as the districts are free in that instance to hire individuals who are not referred by the PSEA. Here, the Navy provides a list of qualified applicants and the District is limited to that list in filling the NSI position. Further, the District has no control over the compensation of the NSI as the NSI salary is set by law (see 10 U.S.C. § 2031(d)(1)). The District is merely obligated to pay the salary and the Navy reimburses the District for one-half of that amount. The Navy and the District independently control the right to discharge the NSI and also the right to direct both the work and the manner in which the work is done. The Navy sets the requirements for the program's curriculum and facilities and both the Navy and the District independently evaluate the NSI. Each entity has the right to terminate the NSI and also the right to discontinue the Junior Reserve Officers' Training Corps Program altogether.

20 PPER at 518. Therefore, the Board held that the NSI position was properly excluded from the bargaining unit of the district's professional employees.

In applying the Board's precedent in **Harbor Creek** to find a joint employer relationship in this case, the Hearing Examiner stated as follows:

The facts in this matter are very similar to **Harbor Creek**... 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.

PDO at 4-5.

In its exceptions, the Association alleges that **Harbor Creek** is inapplicable here because the Air Force disclaimed any right to control the AFJROTC instructors' terms and conditions of employment in its agreement with the District. The Association further alleges that unlike **Harbor Creek**, the Air Force does not control the determination of the AFJROTC instructors' salary because the statutory language only sets forth a minimum salary, thereby giving the District authority to determine how much it will pay the instructors.<sup>5</sup> The Board finds that the language in the agreement between the District and the Air Force does not obviate the actual control that the Air Force exerts over hiring, discharge and direction of the work to be performed by the AFJROTC instructors. Further, the change in the statutory language regarding the calculation of the AFJROTC instructors' salary does not divest the Air Force of control over their pay, but merely provides the District with discretion to pay the instructors more than the MIP. At a

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<sup>5</sup> Because the Association does not challenge any of the Hearing Examiner's Findings of Fact, those findings are conclusive. **Penncrest Education Association, PSEA/NEA v. Penncrest School District**, 46 PPER 58 (Final Order, 2014).

minimum, the Air Force and the District jointly control the calculation of pay to be provided to the AFJROTC instructors. Even if the Board were to conclude that the District solely determines the amount to be paid to the AFJROTC instructors, this would not change the outcome of this matter because the uncontested findings demonstrate that the Air Force controls other aspects of the employment relationship, such that no single entity controls all the terms and conditions of the AFJROTC instructors' employment. **Costigan, supra.**

The Association next asserts that, pursuant to federal case law, the main factor to consider in determining federal employment status is whether the federal government supervises the day-to-day operations of the agency receiving the federal funding. **United States v. Orleans**, 425 U.S. 807 (1976). The Association contends that application of the federal standard to the facts here requires a finding that the District is the sole employer of the AFJROTC instructors, citing **Cavazos v. United States**, 776 F.2d 1263 (5th Cir. 1985) (concluding that JROTC instructors are not federal employees subject to the Federal Tort Claims Act (FTCA)). However, the federal decisions in **Orleans** and **Cavazos** under the FTCA, are not binding on the Board in a unit determination case. Furthermore, our Supreme Court in **Costigan** recognized a joint employer relationship even though the Register of Wills solely controlled the day-to-day supervision of the employees at issue. Therefore, the Association's reliance on this federal case law is misplaced.

The Association asserts that other states include JROTC instructors in professional bargaining units, citing **Appoquinimink Education Association**, 2013 WL 6405886 (2013) and **Washington Teachers' Union, Local 6**, 1990 WL 10554996 (1990), and it urges the Board to follow these decisions. However, the Board is not bound to apply the reasoning of other jurisdictions to matters before the Board because those decisions are based upon construction of each individual state's statutes. See **Cheltenham Township v. PLRB**, 846 A.2d 173 (Pa. Cmwlth. 2004). Indeed, the Board's existing precedent in **Harbor Creek** is controlling and the decisions cited by the Association do not warrant departure from that decision.

Because the Air Force's control over the right to hire, discharge and direct the AFJROTC instructors has not significantly changed since the Board's decision in **Harbor Creek**, the Hearing Examiner properly concluded that the AFJROTC instructor position is jointly employed by the District and the Air Force. Under the Board's precedent in **Harbor Creek**, when a joint employer relationship exists where only one of the joint employers is within the Board's jurisdiction, the Board will not certify those employees into an existing bargaining unit of employees of only the public employer. **Harbor Creek, supra; see also PLRB v. Delaware River Port Authority**, 12 PPER ¶ 12194 (Proposed Order of Dismissal, 1981), 13 PPER ¶ 13072 (Final Order, 1982). As noted in **Harbor Creek**, such an arrangement prevents meaningful bargaining over important terms and conditions of employment that are within the control of a joint employer that is not subject to the duty to bargain that the Board enforces under PERA. Thus, the Hearing Examiner did not err in concluding that the AFJROTC instructor position should not be included in the existing bargaining unit of professional employees of the District, all of whom are solely employed by the District. Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall dismiss the Association's exceptions and affirm the Hearing Examiner's decision dismissing the Petition for Unit Clarification.<sup>6</sup>

#### ORDER

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

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<sup>6</sup> The Association also alleges that excluding the AFJROTC instructors from the bargaining unit violates the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4335, because it denies them the benefits of union membership due to their retired military status. However, the Association waived this issue because it was not raised before the Hearing Examiner. 34 Pa. Code § 95.98(a)(2); **United Transportation Union v. SEPTA**, 40 PPER 87 (Final Order, 2009).

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Wattsburg Education Association, PSEA/NEA are hereby dismissed and the Hearing Examiner's decision dismissing the Petition for Unit Clarification be and the same is hereby 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 nineteenth day of July, 2016. 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.