COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF	:	
	:	Case No. PERA-U-10-343-W
	:	(PERA-R-85-602-W)
SENECA HIGHLANDS INTERMEDIATE UNIT 9	:	

PROPOSED ORDER OF UNIT CLARIFICATION

On September 27, 2010, the Seneca Highlands Education Association PSEA/NEA (Association) filed with the Pennsylvania Labor Relations Board a petition for unit clarification to include the position of teacher-coordinator/learning facilitator in a bargaining unit comprised of professional employes of the Seneca Highlands Intermediate Unit Nine (IU) that was previously certified by the Board at Case No. PERA-R-85-602-W. On October 4, 2010, the secretary of the Board issued an order and notice of hearing directing that a hearing be held on December 20, 2010. On November 16, 2010, the hearing examiner, upon the request of the IU and without objection by the Association, continued the hearing. On January 25, 2011, the hearing examiner held the hearing and afforded the parties a full opportunity to present evidence and to cross-examine witnesses. On March 17, 2011, the Association filed a brief by deposit in the U.S. Mail. On March 21, 2011, the IU filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. On February 1, 1986, the Board in Case No. PERA-R-85-602-W certified the Association as the exclusive representative of a bargaining unit comprised of "[a]ll full-time and regular part-time professional employes" of the IU, "including but not limited to special education teachers, speech and hearing specialists, Chapter I (EICA) employes and Act 89 employes." The Board excluded management level employes from the bargaining unit. (Respondent Exhibit 3)

2. On August 21, 1995, the IU hired Risha K. Johnson as a teacher-coordinator/learning facilitator. The vacancy notice for the position indicated that certifications in special education and in cooperative education were required. Ms. Johnson was certified in special education at the time. She subsequently obtained a certification in cooperative education. (N.T. 13, 16, 41-42, 45; Exhibits C-1, 2, 4, 5)

3. Among other things, Ms. Johnson collaborates with special education teachers in the bargaining unit when they prepare individualized educational plans for special education students and coordinates a coop program under which students at the IU's vocational/technical school work for employers. In coordinating the coop program, she makes sure that prospective employers sign a training agreement indicating that students will be paid minimum wage and covered by workers' compensation insurance. She also makes sure that employers are compliant with child labor, minimum wage and workers' compensation insurance laws while students work for them. She will not place students with employers that will not pay minimum wage or provide workers' compensation insurance. (N.T. 27-34, 37-43; Respondent Exhibit 1)

4. The IU pays Ms. Johnson a salary based on collective bargaining agreements covering members of the bargaining unit. (N.T. 14, 24-25; Exhibits C-12, 13, 15, 18)

5. The current job descriptions for Ms. Johnson are entitled cooperative vocational education teacher-coordinator and vocational education learning facilitator. The cooperative vocational education teacher-coordinator job description lists a Pennsylvania certificate in cooperative education as the minimum qualification for the job. (N.T. 11, 22-23; Exhibits C-20, 21)

DISCUSSION

The Association has petitioned to include the position of teacher-coordinator/ learning facilitator in the bargaining unit. According to the Association, the position,

which is now entitled cooperative vocational education teacher-coordinator and vocational education learning facilitator (finding of fact 5), should be included in the bargaining unit because the current occupant of the position (Ms. Johnson) shares an identifiable community of interest with members of the bargaining unit and is not a management level employe.

The District contends that the petition should be dismissed because Ms. Johnson does not share an identifiable community of interest with members of the bargaining unit and is a management level employe. According to the District, if she shares an identifiable community of interest with anyone, it is with the members of another bargaining unit that includes teachers at its vocational/technical school.

The identifiable community of interest issue

Section 604(1) of the PERA provides as follows:

> "The board shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the board shall:
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> (1) Take into consideration but shall not be limited to the following:
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> (i) public employes must have an identifiable community of interest, and
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> (ii) the effects of overfragmentization."

In FOP v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999), our Supreme Court explained that:

> "To determine whether employees share an identifiable community of interest, the [Board] and/or the court should consider such factors as the type of work performed, educational and skills requirements, pay scales, hours and benefits, working conditions, interchange of employees, grievance procedures and bargaining history. See, e.g. School District of the Township of Millcreek [v. Millcreek Education Association, 64 Pa. Cmwlth. 389, 440 A.2d 673 (1982)]; Warren Borough v. International Brotherhood of Electrical Workers, Local No. 1124, 55 Pa. Cmwlth. 570, 423 A.2d 1117 (1980); Western Psychiatric Institute [v. PLRB, 16 Pa. Cmwlth. 204, 330 A.2d 257 (1974)]; Allegheny General Hospital v. PLRB, 14 Pa. Cmwlth. 381, 322 A.2d 793 (1974). An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, working conditions, or other factors. See Western Psychiatric Institute, supra."

557 Pa. at 594, 735 A.2d at 100.

The record shows that the bargaining unit includes special education teachers, that Ms. Johnson is required to be certified as a cooperative education teacher, that she collaborates with the special education teachers when they prepare individualized educational programs for special education students and that she is paid a salary based on collective bargaining agreements covering members of the bargaining unit (findings of fact 1, 3-5).

Given her certification requirement, collaboration with the special education teachers and common basis for her pay and the pay of members of the bargaining unit, it is apparent that Ms. Johnson shares an identifiable community of interest with members of the bargaining unit. Thus, her position must be included in the bargaining unit unless she is a management level employe.

In support of its contention that Ms. Johnson does not share an identifiable community of interest with members of the bargaining unit, the IU points out that she works 200 days per year rather than 190 days per year as the special education teachers do (N.T. 17), that she only teaches one class per week (N.T. 41) and that her current job description makes no mention of the need for certification in special education (Exhibits C-20, 21). The IU also points out that her office is located at its vocational/ technical school in Port Allegany rather than at its administrative offices in Smethport (N.T. 13, 15, 18), that she is supervised by the director of the vocational/technical school (Donald

Rayda) (N.T. 19), that she mentored a teacher at the vocational/technical school (Monica Hollis) (N.T. 20; Exhibit C-15) and that her benefits are based on the better of the collective bargaining agreements it negotiates with the Association for the bargaining unit and with another employe organization (the Seneca Highlands Area Vocational/Technical Education Association PSEA/NEA) for a bargaining unit that includes teachers at the vocational/technical school (N.T. 25; Exhibits C-13, 16, 18, Respondent Exhibit 2).

The District's contention finds no support in the facts or the law.

In order to be included in a bargaining unit, an employe need not have an identical community of interest with members of the bargaining unit. FOP, supra. Thus, standing alone, the fact that Ms. Johnson works more days per year than the special education teachers do is not dispositive. Nor is the fact that she may not teach as much as they do. Nor is the fact that her certification requirement is in cooperative education while theirs is in special education. Moreover, despite those differences, the fact remains that she is subject to a certification requirement, as does the fact that she collaborates with them when they prepare individualized educational programs, as does the fact that the basis for her pay and their pay is the same, all of which support a finding that she shares an identifiable community of interest with them.

Furthermore, whether or not Ms. Johnson shares an identifiable community of interest with members of the bargaining unit that includes teachers at the IU's vocational/technical school is irrelevant as neither the IU nor the exclusive representative of that bargaining unit has petitioned for her inclusion in that bargaining unit. As the Board explained in Philadelphia Housing Authority, 22 PPER ¶ 22206 (Final Order 1991), aff'd, 23 PPER ¶ 23029 (Court of Common Pleas of Philadelphia County 1992), where a petitioner sought to include unrepresented non-community service employes in their own bargaining unit despite the existence of another bargaining unit represented by another employe organization,

> "[i]t is also irrelevant to the Board's inquiry in this case that the non-community service employes may also have a community of interest with the existing bargaining unit of employes represented by another employe organization. It is not the Board's obligation to certify the most appropriate unit which may be advanced by a party in a Board proceeding but rather to find an appropriate unit. In County of Allegheny, 11 PPER ¶ 11031 (Court of Common Pleas of Allegheny County, 1979), the court stated as follows:
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> > In approaching any unit question, it should be noted that at the outset that the statutory language is to be construed to mean that the Board need not determine the **ultimate unit**, or the **most appropriate unit**; the [PERA] requires that the **unit be appropriate or inappropriate**.
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> 11 PPER at 60 (emphasis in original). The hearing examiner correctly rejected the Employer's argument that the non-community service employes could not be included in the petitioned-for unit because they have a 'stronger' community of interest with the existing unit. The hearing examiner rightly limited his inquiry as to the appropriateness of the petitioned-for residual bargaining unit of nonprofessional employes. The hearing examiner did not err in disregarding the proffered testimony that the non-community service employes may have a community of interest with the employes in the existing certified bargaining unit. As the hearing examiner pointed out, the Employer and the existing representative have not seen fit to petition the Board for inclusion of these positions in the existing unit. Such inaction should not act to deny these employes the right to bargain in a residual unit of nonprofessional employes."

22 PPER at 476-477. Philadelphia Housing Authority is still good law. Bethlehem Area School District, 39 PPER 124 (Order 2008). Thus, neither the fact that Ms. Johnson's office is located at the vocational/technical school, nor the fact that she is supervised by the director of the vocational/ technical school, nor the fact that she mentored a teacher at the vocational/technical school, nor the fact that her benefits may be based on the collective bargaining agreement for the teachers at the vocational/technical

school supports the IU's contention that she does not share an identifiable community of interest with the members of the instant bargaining unit. Compare Nazareth Area School District, 33 PPER ¶ 33039 (Final Order 2002)(where two separate exclusive representatives each seek to include the same employes in existing bargaining units, the employes are to be included in the bargaining unit comprised of those members with whom they share more of an identifiable community of interest).

The management level employe issue

Section 301(16) of the PERA provides as follows:

> "**Section 301.** As used in this act:
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> * * *
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> (16) '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."

Recently, in Abington Heights School District, 42 PPER 18 (Final Order 2011), the Board explained the law under section 301(16) as follows:

> "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:
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> > In Commonwealth of Pennsylvania (Attorney Examiners), 12 PPER ¶ 12131 (Final Order, 1981), the Board interpreted Section 301(16) of PERA in the following fashion:
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> > > 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.
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> > 12 PPER at 203.
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> > * * *
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> > The Board went on in Horsham Township [9 PPER ¶ 157 (Final Order 1978)] to discuss the second part of the test for management level status, i.e.: policy implementation, to include the following:
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> > > …[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.
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> > 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.
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> 37 PPER at 397."

Id. at 54.

The record shows that Ms. Johnson coordinates a coop program under which students at the IU's vocational/technical school work for employers (finding of fact 3). The record also shows that in coordinating the coop program she makes sure that prospective employers sign a training agreement indicating that students will be paid minimum wage and covered by workers' compensation insurance and that she makes sure that employers are compliant with child labor, minimum wage and workers' compensation insurance laws while students work for them. Id. The record further shows that she will not place students with employers that will not pay minimum wage or provide workers' compensation insurance. Id.

According to the District, it is apparent on that record that Ms. Johnson responsibly directs the implementation of policy and therefore is a management level employe under the second part of section 301(16). Notably, however, the record does not show that Ms. Johnson ever changed any of the IU's policies and procedures with regard to the coop program. Rather, the record shows at best that Ms. Johnson observed policy as her compliance duties are routine in nature. Thus, there is no basis for finding that Ms. Johnson responsibly directs the implementation of policy. See Westmoreland County v. PLRB, 991 A.2d 976 (Pa. Cmwlth. 2010), appeal denied, 2011 Pa. Lexis 526 (March 8, 2011), where the court held that employes were not management level under the second part of section 301(16) because the record was silent as to whether or not they changed their employers policies and procedures. Compare AFSCME, Council 13 v. Commonwealth of Pennsylvania, PLRB, 510 A.2d 150 (Pa. Cmwlth. 1986)(employes who made decisions on how to go about adhering to governmental rules and regulations responsibly directed the implementation of policy under the second part of section 301(16)); SSHE, 35 PPER 11 (Final Order 2001)(employes who implemented "new procedures" in the event they found that that their employer not in compliance with the terms of funding grants responsibly directed the implementation of policy under the second part of section 301(16)). Accordingly, Ms. Johnson is not a management level employe.

In support of its contention to the contrary, the IU relies on School District of Philadelphia v. Commonwealth, PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998), but the IU's reliance on that case is misplaced. In that case, the court upheld the Board's decision that employes who monitored their employer's compliance with governmental rules and regulations were not management level because there was no evidence that they ever took corrective action in cases of non-compliance by changing the employer's policies or procedures. As noted above, there is no evidence that Ms. Johnson ever changed any of the IU's policies and procedures with regard to the coop program, so the record supports the same finding as in that case.

CONCLUSIONS

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

1. The IU is a public employer under section 301(1) of the PERA.

2. The Association is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The cooperative vocational education teacher-coordinator/ vocational education learning facilitator shares an identifiable community of interest with the employes in the bargaining unit.

5. The cooperative vocational education teacher-coordinator/ vocational education learning facilitator is not a management level employe under section 301(16) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the certification at Case Nos. PERA-R-85-602-W is amended to include the cooperative vocational education teacher-coordinator/vocational education learning facilitator in the bargaining unit.

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 days of the date hereof, this order will be final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this first day of April 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner