

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : PERA-U-11-341-E
 : (PERA-R-1299-C)¹
WILKES-BARRE AREA SCHOOL DISTRICT :

PROPOSED ORDER OF UNIT CLARIFICATION

On October 7, 2011, the Wilkes-Barre Area Education Support Professionals (Association or Petitioner) filed a petition for unit clarification with the Pennsylvania Labor Relations Board (Board) requesting that the Board include the three positions of cook/manager², cook and head cashier in a unit of nonprofessional employes of the Wilkes-Barre Area School District (District or Respondent) certified by the Board at Case No. PERA-R-1299-C and represented by the Association.

On October 24, 2011, the Secretary of the Board issued an Order and Notice of Hearing in which a telephone pre-hearing conference was set for December 6, 2011 was set as the time of a telephone pre-hearing conference and February 3, 2012, in Wilkes-Barre was set as the time and place of a hearing, if necessary.

The hearing was continued to June 1, 2012. The hearing was again continued to July 9, 2012, at the District's request, without objection from the Association.

The hearing was held on the rescheduled date, but the location of the hearing was changed to Harrisburg. At that time all parties in interest were afforded an opportunity to present testimony cross examine witnesses and introduce documentary evidence. The parties submitted briefs on October 3, 2012.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Wilkes-Barre Area School District is a public employer within the meaning of Section 301(1) of the Act. (N.T. 4, Board Exhibit 1)
2. The Wilkes-Barre Area Education Support Professionals Association is an employe organization within the meaning of Section 301(3) of the Act. (N.T. 4, Board Exhibit 1)
3. On March 10, 1972, at Case No. PERA-R-1299-C, the Board certified the Wilkes-Barre Area Custodial and Maintenance Force, PSSPA-PSEA, as the exclusive representative of the employes of the Wilkes-Barre Area School District in a unit described as

In a subdivision of the employer unit comprised of custodial and maintenance employes and excluding all professional employes, supervisors, first level supervisors, and confidential employes.

(N.T. 4, Board Exhibit 1)

4. On October 11, 1991, the Board entered a Nisi Order of Amended Certification that amended the Nisi Order of Certification to change the name of the employe organization to Wilkes-Barre

¹ The caption was amended by the hearing examiner to show the correct number of the original Pennsylvania Labor Relations Board Certification

² The Association's petition for unit clarification referred to this position as "manager/cook." However, in the hearing and in the post-hearing briefs, the parties referred to the position as "cook/manager," so that latter job title will be used in this order.

Area Custodial and Maintenance Force Educational Support Personnel Association, ESPA/PSEA/NEA. (N.T. 4, Board Exhibit 1)

5. The Association currently operates under the name of the Wilkes-Barre Area Education Support Professionals Association.
6. The District operates five school buildings that offer food services: Coughlin High School, Myers High School, GAR High School, Solomon/Plains Elementary and Junior High School (K-8) and Heights Elementary School. (N.T. 6, 40)
7. The parties stipulated and agreed that the positions of cook and head cashier share a community of interest with the positions in the bargaining unit and should be included in the unit by the Board. (N.T. 4-5)
8. At each of the five schools' cafeterias, there is a cook/manager. (N.T. 5-6)
9. The parties stipulated and agreed that the position of cook/manager at these schools shares a community of interest with the positions in the existing nonprofessional bargaining unit certified at PERA-R-1299-C. (N.T. 60)
10. For the past 12 years, the District has had a contract with Nutrition Group, Inc. to manage, oversee and provide food services for the entire District. (N.T. 6-7, 9)
11. David Feller is Nutrition Group's Food Service Director. He supervises and manages the District's food service operation and, in that capacity, frequently visits the District's kitchens (several times a month or several times a month). (N.T. 9, 19, 28, 42)
12. Servers work at each of the schools. They prepare and serve food for students. The servers are employees of Nutrition Group, not the District. (N.T. 7, 22, 41-42)
13. The other cafeteria employees are the positions of cashier and cook at each school. These are District employees. (N.T. 22)
14. There have been no substantial changes in the job duties of the cook/manager in the past five years. (N.T. 12-13)
15. The cook/managers report directly to Feller. (N.T. 17)
16. Feller regularly disseminates information via memoranda on the company's policies and procedures to the cook/managers. (N.T. 17)
17. Feller also disseminates this information at monthly meetings with the cook/managers. (N.T. 17, District Exhibit 1)
18. Feller tries to visit the buildings three or four times a week. He may not revisit the same building for a period of two or three weeks. (N.T. 19)
19. The cook/managers have the chance to give input to Feller on the upcoming month's menus, to see if the menu matches up with the cafeteria's order days. (N.T. 20)
20. The cook/managers have the authority to decide what way to serve salad in their particular building. (N.T. 20)
21. The cafeteria cook/manager at the Solomon/Plains Elementary/Junior High School is Mary Ann Susek. (N.T. 39-40)

22. Susek spends 75% of her time as a cook and in the preparation of meals. The remainder of her time she spends seeing that the cafeteria is running properly. (N.T. 44)
23. Working with Susek are fourteen servers and one cook. (N.T. 41, 47)
24. Susek testified that the cook/managers have played no role in the determination of the policies for the cafeteria. The policies, including rules and regulations are set by the Nutrition Group, Inc. (N.T. 49, 50, 55, 56, 69-70)
25. Whenever the cook/manager discovers there has been a violation of policy or procedure, she immediately contacts Feller, who decides how to remedy the situation. Feller then instructs the cook/manager on what to do. (N.T. 49-50, 57)
26. The cook/manager has no authority to decide how to correct a non-compliance issue of "fix" the problem. Only David Feller can make that decision. (N.T. 50, 69-70)
27. On November 22, 2012, the cook/managers did formal evaluations of their employees. The evaluations did not lead to discipline of anyone. (N.T. 80)
28. Before the petition for unit clarification was filed, the cook/managers never evaluated anyone in the workplace. (N.T. 40, 68, 77)

DISCUSSION

The Association's petition for unit clarification seeks to include three positions in the nonprofessional unit of employees. The positions are cook/manager; cook and head cashier. On the day of the hearing, the Association and the District agreed that two of the positions, cook and cashier, shared a community of interest with the existing nonprofessional unit and should be included in the unit.

The District opposes the inclusion of the cook/manager in the unit on the grounds that the position is a supervisor under section 301(6) of PERA and management level under section 301(16) of PERA.

As the party asserting the exclusion, the District has the burden of proving that the position should be excluded from the bargaining unit. **State System of Higher Education**, 29 PPER ¶ 29234 (Final Order, 1998), **aff'd**, 737 A.2d 313 (Pa. Cmwlth. 1999); **Danville Area School District**, 8 PPER 195 (Order and Notice of Election, 1977).

Supervisory Level Exclusion

As for the first issue, whether the cook/managers are supervisors under Section 301(6) of PERA, section 301(6) of PERA defines a supervisor as

"...any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."

43 P.S. 1101.301(6).

Employees must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. **McKeesport Area School District**, 14 PPER ¶ 14165 (Final Order, 1983). The distinguishing characteristic of an alleged supervisor is that the person holds authority that calls for the use of independent judgment and carries with it the power to reward or

sanction employees. **Mifflin County**, 14 PPER ¶ 14012 (Proposed Decision and Order, 1982); 14 PPER ¶ 14051 (Final Order, 1983).

The District's job description asserts that the cook/manager "supervises" and "manages" "all food service workers." But this fact is not relevant to proving whether the employees actually perform tasks that meet the statutory test for supervisors or management level employees. **Employes of Lehigh Carbon Community College**, 40 PPER 58 (2009).

The District, through the testimony of David Feller from the Nutrition Group, Inc. offered evidence that the cook/managers give the servers verbal and written warnings. However, the servers are the employees of the Nutrition Group, Inc. Therefore, as a matter of law, any relationship between the cafeteria manager/cook and the servers cannot be a supervisory relationship, since they are not District employees. **Manchester Ambulance Club**, 32 PPER ¶ 32039 (Final Order, 2001), citing **Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. PLRB**, 383 A.2d 546 (Pa. Cmwlth. 1978)

The other District employees in the cafeterias are the cashiers and the cooks. However, the District did not show that the cook/managers exercise any of the statutory supervisory functions over the cashiers or cooks.

On November 22, 2012, the cook/managers did formal evaluations of their employees. The evaluations did not lead to discipline of anyone. (N.T. 80). Furthermore, because these evaluations occurred after the Association filed the petition for unit clarification, it cannot be considered as probative on the question of supervisory status. **North Hills School District v. PLRB**, 762 A.2d 1153 (Pa. Cmwlth. 2000).

Management Level Exclusion

The District next contends that the cook/manager position should be excluded because it is a management level employe under section 301(16) of PERA, which states:

(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.

43 P.S. § 1101.301(16). Under this provision, a position is at the management level if the employe holding that position (1) is involved directly in the determination of policy; (2) directs the implementation of policy; or (3) is above the first level of supervision. **Pennsylvania Association of State Mental Hosp. Physicians v. PLRB**, 554 A.2d 1021 (Pa. Cmwlth. 1988); **Commonwealth of Pennsylvania (Attorneys Examiner I)**, 12 PPER ¶ 12131 (Final Order, 1981). Moreover, the Board has long adhered to a policy of evaluating the actual job duties of the position in question to make unit determinations. **In the Matter of the Employes of Elizabeth Township**, 33 PPER ¶ 33053 (Final Order, 2002); **Washington Township Municipal Auth. v. PLRB**, 569 A.2d 402 (Pa. Cmwlth. 1989). When determining whether a position is accorded managerial status, the Commonwealth Court has held that "employees are properly classified as 'management level' employees where some, but not all, of their employment functions place them within the statutory definition of management level employees as set forth in § 301(16) of the Act." **Carlynton**, 377 A.2d at 1035.

The District's first argument for management level status is that the cook/managers are "involved directly in the determination of policy."

In **Pennsylvania Association of State Medical Hospital Physicians v. Commonwealth**, PLRB, 554 A. 2d 1021 (Pa. Cmwlth. 1989), the Commonwealth Court adopted the Board's definition of the first part of Section 301(16) of PERA as set forth in **Horsham Township**, 9 PPER 9157 (Final Order, 1978)

An individual who is involved directly in the determination of policy would include not only a person who has authority or responsibility to select among options and to put proposed policies into effect, but also a person who participates with regularity in the central process which results in a policy proposal and a decision to put such proposals into effect. Our reading of the statute does not include a person who simply drafts language for the statement without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

9 PPER at 327.

The District has not proven that the cook/managers are involved directly in the determination of policy. The policies under which the cafeterias are operated are set by Nutrition Group, Inc. Mary Ann Susek, the cook/manager at the Solomon/Plains Elementary/Jr. High School, testified that she has had no role in the determination of any policies for her cafeteria. The cook/managers attend an annual orientation meeting and monthly meetings run by the Nutrition Group, Inc. to hear how the company expects the cafeterias to run. At these meetings, the policy that has already been determined by the Nutrition Group, Inc. is explained to the managers and discussed.

The District's second basis for excluding the cook/managers as a management level employe is that the employe in that position "responsibly directs the implementation [of policy]." This contention has not been proven.

The District has cited no Board decisions that found a cafeteria manager to be a "management level" employe on the basis of meeting the second part of section 301(16) of PERA. The District contends that the cook/managers implement policy by seeing that the food served in the cafeterias meets District, state and federal policies. However, in another school case, **In Re Employes of Jefferson Morgan School District**, 31 PPER 31115 (2000), the Board held that merely monitoring and ensuring compliance with established policy is not enough to confer management level status. "Rather, in order to be considered a management level employe, the employe must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found." **Municipal Employes of the Borough of Slippery Rock**, 14 A.3d 189, at 192. (Pa. Cmwlth. 2011).

In the present case, whenever a cook/manager discovers there has been a violation of policy or procedure, she immediately contacts Feller, who decides how to remedy the situation. Feller then instructs the cook/manager on what to do. Feller is the one who has the authority to decide how to "fix" issues with noncompliance with policies or regulations. The cook/managers have no authority in this area. Under these facts, the cook/manager does not meet implement policy. **In Re Employes of Jefferson Morgan School District, supra**.

The District also contends that the cook/managers implement policy because they have "regular and continuous input with regard to ordering for their particular school" and for deciding the apparel policy that the food service employes must follow in a particular building. These are minor decisions. They can only be made within the range of options that would be acceptable to the District and Nutrition Group, Inc. These facts, too, are an insufficient basis for the District to meet its burden of proof on the question of whether the cook/managers responsibly directs the implementation of policy so as to be management level employes.

CONCLUSIONS

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

1. The Wilkes-Barre Area School District is a public employer within the meaning of section 301(1) of PERA.

2. The Wilkes-Barre Area Education Support Professionals is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The positions of cook/manager, cook and head cashier share an identifiable community of interest with the employes in the unit certified by the Board at PERA-R-1299-E.
5. The position of cook/manager is not a first level supervisor under section 301(6) of PERA or a management level employe under Section 301(16) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Association's petition for unit clarification is granted and the unit of employes certified by the Board at Case Number PERA-R-1299-C is hereby amended to include the positions of cook/manager, cook and head cashier.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions to this order filed pursuant to 34 Pa. Code § 95.98 (a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this twenty-first day of December, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner