

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: PERA-U-11-35-E
: (PERA-R-99-516-E)
YORK COUNTY :

PROPOSED ORDER OF DISMISSAL

On February 8, 2011, York County (County or Petitioner) filed a petition for unit clarification with the Pennsylvania Labor Relations Board (Board) requesting that the Board exclude counselors from a unit of professional prison guards represented by Teamsters Local 776 (Union or Petitioner) certified by the Board at PERA-R-99-516-E.

On February 17, 2011, the Secretary of the Board issued an Order and Notice of Hearing fixing March 8, 2011, as the time of a telephone pre-hearing conference and May 25, 2011 in Harrisburg as the time and place of a hearing, if necessary, before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

On May 25, 2011, the examiner continued the hearing at the request of the parties to permit time for settlement discussions. The discussions did not settle the matter. A hearing was necessary and was scheduled for July 13, 2011, but was continued to September 15, 2011. At that time, all parties in interest were afforded an opportunity to present testimony cross examine witnesses and introduce documentary evidence.

The examiner, on the basis of the stipulation of facts and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. York County is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act (PERA). (Stipulation of Fact 1, Board Exhibit 1)

2. Teamsters Local 776 is an employe organization within the meaning of Section 301(3) of PERA. (Stipulation of Fact 2, Board Exhibit 1)

3. York County operates a prison at 3400 Concord Road, York, Pennsylvania. (Stipulation of Fact 4, Union Exhibit 1)

4. In 1999, the Union filed a petition for representation to Case No. PERA-R-99-516-E, seeking to accrete prison counselors into an existing professional unit of youth counselors, case managers and recreational coordinators that the Board certified at Case No. PERA-R-96-489-E. (Stipulation of Fact 3, Board Exhibit 1)

5. A majority of the prison counselors voted in favor of Union representation. (Stipulation of Fact 3)

6. On March 17, 2000, at Case No. PERA-R-99-516-E, the Board certified the Union as the exclusive bargaining representative of County employes in a bargaining unit described as follows;

All full-time and regular part-time professional prison guard employes, including but not limited to youth counselors, case managers, recreational coordinators and prison counselors; and excluding management level employes, supervisors, first level supervisors, confidential employes and security guards as defined in the Act.

(Stipulation of Fact 4)

7. The County employs twenty-two (22) prison counselors. They work with the prison's approximately 2,400 inmates. (N.T. 14, 51, 53)

8. The job description for the position states, in the summary, that "Counselors are responsible for providing counseling services to the general population, including admission orientation, classification, and providing basic information related to their incarceration." (N.T. 14, 51, 53, County Exhibit 1)

9. The job description also states, under "essential duties and responsibilities" that the prison counselors are, among other things, to "devise plans to help prisoners with their problem and to make their adjustment to incarceration as acceptable as possible" and to "provide assessment, treatment and re-entry services to the general prison population in an effort to assist them with various in-prison personal problems." (N.T. 14, 50-51, County Exhibit 1)

10. The counselors have offices both in the common areas of the prison and on the blocks and wings where the prisoners reside. (N.T. 53-55)

11. Prison counselors provide counseling services to inmates in one of two areas, in the counselor's office or in multi-purpose rooms. When they are counseling an inmate they are alone with the inmate. (N.T. 29, 56-59)

12. Counselors' offices have no locks on their doors. Therefore, if a counselor has to remove an inmate from his office, there is no way the counselor can lock the door to prevent the inmate's re-entry. (N.T. 184-185)

13. Corrections officers regularly patrol the areas in which the counselors work. However they could be as far as 40 feet away from the counselor. (N.T. 54-55)

14. The majority of inmates walk freely and unrestrained in the prison, as well as to an from medical, attorney/client rooms, counselor's offices, programs and visits. (N.T. 188)

15. The general population inmates do not require a corrections officer escort, but rather are observed by the corrections officers from point A to point B ("point to point" observations). They are escorted by counselors. The escort could be for as long as 400 yards. (N.T. 89-91)

16. Inmate movement is also observed by corrections officers via camera. (N.T. 32)

17. In the areas in which inmates are free to move about, such as hallways, the prison counselors may walk along in the same hallways as the inmates. (N.T. 31-33)

18. Intensive custody and protective custody inmates, however, are escorted by corrections officers. (N.T. 182, 185-186).

19. Prison counselors may call to have inmates brought to their office. In those circumstances, either a corrections officer or a captain escorts the inmates to the counselor's office. Another counselor does not escort inmates. (N.T. 185-186)

20. Counselors are unattended by a correctional officers when they are in the general population. (N.T. 24-25)

21. Clair Doll is the Deputy Warden for treatment. He is responsible for managing the work of the prison counselors. (N.T. 14-16)

22. Warden Doll testified that the inmates are "observed" but "do not need to be escorted" other than by the counselors. Counselors are alone with general population inmates while in the halls of the Prison. (N.T. 31)

23. Counselors attend the basic training academy for four weeks, which covers basic prison operations, "what to expect in corrections" and how to conduct themselves in a prison. This is part of the same training that the corrections officers receive. (N.T. 14-15, County Exhibit 1)

24. In 2009, the training for prison counselors was changed. They no longer receive instruction in the use of force, cell extractions and firearms training. (N.T. 20)

25. Beginning in 2009, the prison administration notified the counselors that they are no longer responsible for restraining inmates or otherwise securing them. (N.T. 22)

26. Deputy Warden Doll admitted that there are situations where counselors have grabbed hold of an inmate to stop them from doing something, such as engaging in altercations. (N.T. 74-75)

27. The prison's Physical Procedures Manual, at Section "C"-Personnel, Rules and Regulation 4, states, "4. Each employe is to assist in preventing escape or in pursuing an escapee as directed by the Warden or his designee." (N.T. 100-103, Union Exhibit 3)

28. Warden Doll testified that he has never come out and told the counselors "You don't have to respond." (N.T. 113)

29. Behavior Adjustment Unit (BAU) inmates are on a special unit because they committed a disciplinary infraction within the institution. (N.T. 62)

30. When BAU inmates are left alone with a counselor, they are in handcuffs. (N.T. 62-63)

31. Jen Rogers is the counselor for Echo Block, which includes inmates on intensive custody status, due to disciplinary issues or threats they made to the security of the institution. (N.T. 165)

32. Rogers sees these inmates several times a month. When she does, the inmates are under her sole care, custody and control. (N.T. 165-167)

33. Benjamin Harry is a treatment specialist counselor. He counsels minimum security work release inmates and state prison inmates on a track to return to their homes once they complete their sentence. He works in a large office with additional people, but will meet with inmates at his desk when the other people are not there. (N.T. 195-196)

34. Harry interviews inmates to determine whether to recommend them for work release. He writes daily reports and misconduct reports regarding disturbances and infractions. (N.T. 197)

35. When Harry meets with an inmate, there are occasions when Harry meets with an inmate that there are no corrections officers nearby. The inmate is then in his full care, custody and control. (N.T. 199-200)

36. Henry Massa is one of the two drug and alcohol counselors at the prison. He has worked in that position for sixteen years. (N.T. 213)

37. Massa meets daily in his office with inmates, with no corrections officer present. He meets weekly in a group session with 10-12 inmates with no corrections officer present. (N.T. 215)

DISCUSSION

The County's petition for unit clarification seeks to exclude counselors from a unit of professional prison guard employees. The County employs 22 counselors at the York County Prison for the 2,400 inmates in the prison. This is the first time the guard status of the counselors has been litigated. In 2000, when the Board certified the unit, the parties stipulated to include the counselors in the unit. Accordingly, it is not necessary for the County to show a change in duties to adjudicate the present petition. In the Matter of the Employees of Westmoreland County, 32 PPER ¶ 32133 (Proposed Order of Dismissal, 2001)

York County's professional guards are in a separate unit because of Section 604(3) of PERA, which states:

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:

...

(3)Not permit guards at prisons and mental hospitals
....to be included in any unit with other public
employees,...."

43 P.S. 1101.604(3).

Section 604(3) does not define "guards at prisons." However, since the enactment of PERA in 1970, several hearing examiner and Board decisions have found certain prison employees to be guards even though they were not traditional full-time corrections officers.

In Huntingdon County, 12 PPER ¶ 12156 (Final Order, 1981) the Board found cooks to be guards, even though the primary function of the cooks was to prepare food. The Board noted that the cooks were responsible for the security of work release inmates on the same first floor as the kitchen, had keys to the work release area of prison across a hall from the kitchen and directly supervised one work release inmate in the kitchen.

In Fayette County, 14 PPER ¶ 14159 (Final Order, 1983), the Board found a maintenance worker at a prison to be a guard even though his primary function was maintaining the prison and his secondary function was serving as a guard. The Board determined that his "occasional guard duties" were sufficient under PERA to classify the employe as a "guard" because it is "the nature of [his] duties, not the frequency of the duties" that is controlling. Fayette County (citing Waltherboro Manufacturing Corp. and Int'l Ladies Garment Workers Union, A.F.L., 106 NLRB 1383 (1953)). The Board noted in Waltherboro Manufacturing that the NLRB found the employees at issue were guards even though 75% of their working time was spent on maintenance work and 25% on guard work.

In PA Dep't of Corrections, 19 PPER ¶ 19025 (Proposed Order of Unit Clarification, 1987), this Hearing Examiner added the positions of corrections food service instructor, corrections equipment operator, corrections tradesman instructor and corrections factory foreman to the Commonwealth of Pennsylvania's H-1 unit of guards. The petitioner in that case, AFSCME, proved that the employes in question performed functions related to the security of the institution and the inmates.

In Commonwealth of Pennsylvania Department of Corrections, 41 PPER 59 (Proposed Decision and Order, 2010), 41 PPER ¶ 100 (Final Order, 2010) this Hearing Examiner dismissed a petition to remove barber instructors, barber managers and cosmetology instructor from the statewide prison guard unit. My reasoning is worth repeating here:

In the present case, the testimony showed that employees in the positions at issue also perform functions related to the security of the institution and the inmates. The guarding of inmates may not be the primary duty of the barber instructor, barber manager and cosmetology instructor. Nevertheless, the work they do guarantees the security of the institution and inmates while these inmates are in their care and custody.

41 PPER 59, at 205.

The most recent Board decision on the guard status of prison employees who are not correctional officers is Lancaster County, 42 PPER ¶ 31 (Final Order, 2011), rev'd 35 A. 3rd 83, 43 PPER ¶ 97, 2012 WL 178017 (Pa. Cmwlth, January 11, 2012), petition for allowance of appeal filed, February 13, 2012. The Board found maintenance mechanics at the Lancaster County prison to be guards because they supervised inmates outside the walls of the prison. In its Final Order, the Board cited with approval Commonwealth of Pennsylvania Department of Corrections, supra.

The personnel classification in the present case, counselors, was the subject of two Board cases. Counselors were included in the guard unit. In Chester County, 16 PPER ¶ 16178 (Order Directing Submission of Eligibility List, 1985), Hearing Examiner John Skonier found prison counselors to be guards under PERA. The counselors had daily contact with inmates, searched inmates, patrolled hallways and athletic yards, and assisted with visitation. Even though the counselors did not spend the majority of their time guarding inmates, they nevertheless were used by the prison as "another link in the chain of security." Id at 455.

In Westmoreland County, 32 PPER ¶ 32133 (Proposed Order of Dismissal, 2001), Hearing Examiner Donald Wallace dismissed an employer's petition to remove corrections counselors and treatment supervisors from the prison guard unit. The Examiner found that corrections counselors and the treatment supervisor were responsible for the security of inmates during classification meetings and during "contact visits." No corrections officer was present at those times. In addition, the record shows that the corrections counselors and the treatment supervisor are responsible for the security of inmates cleaning the administrative offices when a corrections officer is not present. The record also showed that the County required the corrections counselors and the treatment supervisor to attend training for corrections officers.

Considering all of the facts in the present case and the law as it has been developed over the years, the counselors at the York County prison should remain in the guard unit. The counselors are "another link in the chain of security" as set forth in Chester County, supra. The Union demonstrated by direct examination of three prison counselors and cross examination of the prison deputy warden and treatment supervisor that the prison counselors are responsible for the security of the inmates. The prison counselors are often alone with inmates and are responsible for their care, custody and control during those times.

The facts of the present case are close to those in Westmoreland County, supra. They spend time alone with the inmates either in their offices, in multi-purpose meeting rooms or in hallways while escorting inmates to meetings. Corrections officers may be on the same floor at these times, but they may be 40 feet away. The counselors have received a four week orientation course that includes training in security. Their have been occasions when they have had to restrain inmates.

The County contends that the counselors are not "guards at prisons" under Section 604(3) of PERA. The County argues that the counselors are not responsible for the inmates' security. The County's argument has two threads.

First, the County argues that it has implemented specific measures in the past two years to ensure that prison counselors do not perform a security role. In 2009, the training for prison counselors changed. They no longer receive instruction in the use of force, cell extractions and firearms training. Also, the County contends that beginning in 2009, the prison administration notified the counselors that they are no longer responsible for restraining inmates or otherwise securing them. The County has instructed the counselors to seek assistance if they need help with an inmate.

However, the Union has never agreed to this change in the counselor's duties. The Union points out that this failure to obtain the Union's agreement on the change of duties arguably violates the collective bargaining agreement, making the change of little relevance to their guard status. Furthermore, the Union points out that the reality of the prison as a workplace is that on occasion, the counselors do have to restrain inmates. Deputy Warden Doll admitted to this fact. It should also be noted that the Prison's Physical Procedures Manual, at Section "C"-Personnel, under Rules and Regulation states, "4. Each employee is to assist in preventing escape or in pursuing an escapee as directed by the Warden or his designee." Also, Warden Doll admitted that he has never come out and said "You don't have to respond."

Second, the County argues that the corrections officers regularly patrol the areas in which the counselors work and are just a call away if they need assistance. The Union rebuts this argument by pointing out that in prior cases, the Board has found employes to be guards even when they share the care, custody and control of inmates with corrections officers during the course of their shift.

There is an additional reason that the counselors should remain in a guard unit. That reason relates to the PERA's overall framework for the resolution of bargaining impasses. The Section 604(3) guard exclusion must be read in conjunction with PERA's impasse provisions. Section 805 of PERA has a different bargaining impasse procedure for employes who are "guards at prisons" and provides:

Notwithstanding any other provisions of this act where representatives of units of guards at prisons or mental hospitals or units of employes directly involved with and necessary to the functioning of the courts of this Commonwealth have reached an impasse in collective bargaining and mediation as required in Section 801 of this article has not resolve the dispute, the impasse shall be submitted to a panel of arbitrators whose decision shall be final and binding upon both parties with the proviso that the decisions of the arbitrators which would require legislative enactment to be effective shall be considered advisory only.

43 P.S. 1101.805.

Under Section 805, the prison counselors, as professional guards, currently have a right to submit their bargaining disputes to a panel of arbitrators instead of the right to collectively withhold their labor via a strike. If there was a strike of employes at the York County prison, it is unclear from this record who would provide counseling services during such time. An essential element of prison security is maintaining a peaceful environment where the problems of incarcerated inmates are dealt with in a productive and meaningful way. The 22 counselors at the York County Prison are integral to creating a peaceful and orderly human environment for the 2,400 inmates, contributing as much to the security of the prison as do traditional corrections officers. It is doubtful that the York County Prison could maintain security if the counselors were not there due to a strike.

CONCLUSIONS

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

1. That York County is a public employer within the meaning of Section 301(1) of PERA.
2. That Teamsters Local 776 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the position of counselor is a guard within the meaning of Section 604(3) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the 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 absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventh day of June, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner