

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-R-13-280-E
 :
 :
 LEHIGH COUNTY :

PROPOSED ORDER OF DISMISSAL

On October 23, 2013, the Lehigh County Court Appointed Professional Officers Association (Association) filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) alleging that it represented 30 percent or more of the professional employes of Lehigh County (County) and requesting the Board to order an election to determine the exclusive representative for the purpose of collective bargaining pursuant to the provisions of the Public Employee Relations Act (PERA or Act). The Petition further alleged that the American Federation of State, County and Municipal Employees (AFSCME) is the certified bargaining agent for these employes and that the collective bargaining agreement expired on December 31, 2013.

On November 6, 2013 the Secretary of the Board issued an Order and Notice of Hearing in which the matter was assigned to a December 4, 2013 pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating December 31, 2013 in Harrisburg, as the time and place of hearing if necessary.

On December 12, 2013, the County forwarded correspondence, indicating that it would not be appearing for or participating in the hearing, given that the issues did not directly involve the County. The hearing was subsequently continued to January 24, 2014.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. AFSCME and the Association filed timely post hearing briefs in support of their respective positions.

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

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (See Nisi Order of Certification at PERA-R-95-357-E, 1995)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA and was certified by the Board in 1995 as the exclusive collective bargaining representative of the following unit of employes of Lehigh County:

All full-time and regular part-time professional and nonprofessional employes who are involved with and necessary to the functioning of the courts and who are hired, fired and directed by the courts including but not limited to employes in Court Administration, Adult Probation, Juvenile Probation, Clerk of Orphans Court, Domestic Relations, Master in Divorce, District Justice Offices and the Law Library; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act.

(See Nisi Order of Certification at PERA-R-95-357-E, 1995)

3. The Association is an employe organization within the meaning of Section 301(3) of PERA. (See Petition for Representation)

4. At the election that resulted in AFSCME's certification to represent the court-appointed bargaining unit, in accordance with the requirements of Section 604(2) of PERA, the professional employees were given the opportunity to indicate their preference for representation in a separate unit of professional employees only, or in an overall unit of professional and nonprofessional employees. (*Id.*; See also N.T. 71)
5. In that election, the professional employees voted 42 to 11 in favor of being included in a unit comprised of professional and nonprofessional employees. (See Nisi Order of Certification, *supra*)
6. Presently, there are approximately 250 employees in the court-appointed bargaining unit, 80 to 85 of whom (about one-third) are professional employees. (N.T. 108-109)
7. AFSCME Local 3206 (Local 3206) is a local union, affiliated with AFSCME District Council 88, comprised of employees within the court-appointed bargaining unit. (N.T. 90-91)
8. Since 2010, Denise Luna has been employed by AFSCME as a staff representative, and has been assigned to work with Local 3206 and the court-appointed bargaining unit. Prior to her employment with AFSCME, she worked for the County of Bucks and served several leadership roles in her AFSCME local union there, including serving on the AFSCME negotiations team in three sets of contract negotiations. (N.T. 89-90, 103)
9. The elected leadership of Local 3206 includes officers, executive board members, and trustees. All of these positions are elected at large from among the AFSCME members within the professional/nonprofessional unit. (N.T. 91-92; AFSCME Exhibit 1)
10. Since the court-appointed unit was originally certified, a number of professional employees have served as president of Local 3206, including Joe Reichert, Dorothy Stuart, and Matt Styles. (N.T. 45, 59-60, 63, 71, 72, 100; AFSCME Exhibit 1)
11. There are three professional employees currently serving on the AFSCME Local 3206 Executive Board, Kristin Berke, Jonathon Lilly, and Vincent Pioli, while two of Local 3206's three current Trustees are professional employees, Jason Baer and Aaron Lichtfus. (N.T. 43-44, 93; AFSCME Exhibit 1)
12. Sue Sedora, as Local 3206 President, has appointed a professional employee, Ms. Stuart, as a shop steward, and has appointed three professional employees, Kurt Ruane, Ms. Stuart, and Robert Nichelson, as members of the negotiations committee for the current contract negotiations. (N.T. 44-45, 60-61, 94, 97-98, 122-123)
13. During every round of contract negotiations since the court-appointed unit was certified, one or more professional employees have served on every negotiations team. Ms. Stuart has been involved in every negotiations except the negotiations for the 2011-2013 collective bargaining agreement. During those negotiations, three professional employees, Mr. Styles, Tracy Davis Henry, and Mr. Baer, served on the union negotiating team. (N.T. 39-40, 63-64, 78)
14. The most recent collective bargaining agreement is effective January 1, 2011 through December 31, 2013. The parties are still in negotiations for a successor agreement and are scheduled to proceed to interest arbitration in April 2014. (N.T. 31-32, 61, 106; Association Exhibit 1)
15. The 2011-2013 collective bargaining agreement includes a number of provisions that apply predominantly to professional employees. For example, Article XV provides that employees who are on stand-by and assigned a beeper or similar device are paid a daily rate. The agreement specifically provides one rate for

professional employes and a lower rate for nonprofessional employes. Article XIV requires that employes who work a shift beginning after noon or before 5:00 a.m. receive a 50 cent shift differential. Article XXVIII provides that, when employes are required to use their personal vehicles for work, the County will reimburse them for mileage, parking costs, and for the difference between regular insurance rates and business insurance rates. Article XXX requires the County to provide a meal allowance to employes who travel outside the County on County business. (N.T. 41-43, 45-48, 74-75, 77-79; Association Exhibit 1)

16. Under the 2011-2013 collective bargaining agreement, professional employes such as probation officers and domestic relations officers are paid on higher pay scales than their nonprofessional, clerical coworkers. (See Association Exhibit 1 at Exhibits A & B)
17. In the current negotiations, AFSCME has made proposals to increase the stand-by rate of pay for professional employes, and the meal allowance rate, which affects mostly professional employes. In addition, the County has proposed elimination of the auto insurance reimbursement, which also affects mostly professional employes, and AFSCME has opposed that proposal. (N.T. 74-75, 118-120)
18. Prior to the start of the current contract negotiations, AFSCME surveyed its members seeking input through the submission of wish lists, regarding what sort of proposals they would like to make. Similarly, during the contract negotiations, Ms. Luna personally asked a number of professional employes to provide input regarding proposals they would like AFSCME to make. She noted that the Union could propose to address such issues into an appendix to the collective bargaining agreement or incorporate such proposals into the language of the agreement. The professional employes she spoke to said they would provide information, but as of the date of the hearing, they had not done so. (N.T. 81, 98-99, 114, 116)
19. Following ratification of the 2011-2013 agreement, there was an issue about the County's placement of certain professional employes on the pay scale. Ms. Sedora, the Local 3206 President, filed a grievance concerning the issue, which was ultimately resolved in favor of the professional employes. Those employes had their pay adjusted, and received back pay to make them whole for the error. (N.T. 28-29, 39, 99-100; AFSCME Exhibit 2)
20. Since AFSCME was certified to represent the court-appointed unit, there have been five collective bargaining agreements. Three of them were reached through interest arbitration and two through negotiations. The current contract negotiations are proceeding to interest arbitration. AFSCME has appointed an attorney to serve as its arbitrator in the past, but has also appointed a staff representative to serve in that regard. (N.T. 14, 58-59, 61, 67-69, 101-102)

DISCUSSION

Section 604 of PERA provides, as follows: "[t]he board shall determine the appropriateness of a unit which shall be the public employer unit or subdivision thereof. In determining the appropriateness of the unit, the board shall:

- (1) Take into consideration but shall not be limited to the following:
 - (i) public employes must have an identifiable community of interest, and
 - (ii) the effects of over fragmentation.
- (2) Not decide that any unit is appropriate if such unit includes both professional and nonprofessional employes, unless a majority of such professional employes vote for inclusion in such unit."

It is well settled that, in furtherance of the policy of PERA, the Board does not splinter off groups of employees from existing units, but conducts rival representation proceedings in the unit as currently certified. **Pennsylvania Office of Attorney General**, 43 PPER 84 (Final Order, 2011) citing **Pennsylvania Board of Probation and Parole**, 43 PPER 20 (Final Order, 2011); **Pennsylvania Office of Attorney General**, 31 PPER ¶ 31033 (Final Order, 2000). Where severance of an existing bargaining unit is requested, the Board will grant severance if either (1) the employees sought to be severed no longer exhibit an identifiable community of interest with the remaining employees, or (2) the interests of the group of employees seeking severance have not been fairly and adequately represented in the existing unit. **In the Matter of Employees of Berks County**, 32 PPER ¶ 32082 (Final Order, 2001); **In the Matter of the Employees of Perry County**, 34 PPER 156 (Proposed Order of Dismissal, 2003).

In this case, the Association has petitioned to sever the professional employees from a bargaining unit of professional and nonprofessional court-appointed employees which was previously certified by the Board at Case No. PERA-R-95-357-E. The Association presents two arguments in support of its position. Initially, the Association contends that the petition should be granted and an order of election should issue, as a matter of law, consistent with Section 604(2) of PERA, because more than 75 percent of the professional employees have expressed their desire to sever from the previously certified unit. Likewise, the Association posits that an order of election should issue because the interests of the professional employees have not been fairly and adequately represented by AFSCME. The Association has not satisfied the conditions for severance, and therefore, the Petition for Representation will be dismissed.

As set forth directly above, the Association first argues that an order of election should issue because the facts of record establish that 75 percent of the professional employees, if not more, no longer want to be represented by the incumbent union and have announced their desire to be represented by the Association in a unit of professionals only. Specifically, the Association claims that since it submitted 68 signed authorization cards, and there are 80 to 85 professional employees in the unit, this is not a case where a smaller group of professionals or nonprofessionals are seeking severance. Pointing to Section 604(2) of PERA, the Association asserts that the legislature has expressed a clear intent that a unit is not appropriate "if such unit includes both professional and nonprofessional employees, unless a majority of such professional employees vote for inclusion in such unit." As a result, the Association urges the Board to depart from its typical policy considerations surrounding rival petitions, as the potential disruption to ongoing labor management relationships cannot provide a basis to deny the issuance of an election order in this matter. The Association's reliance on Section 604(2) of PERA, however, is misplaced, as that provision does not support severance in the instant matter.

Although the Association is correct in stating that the professional employees cannot be included in a unit with nonprofessionals unless a majority of the professional employees votes for such inclusion, the simple fact is that the professional employees already did vote to be included in a unit with the nonprofessionals in 1995 when the court-appointed unit was originally certified. As AFSCME points out, the legislative intent evident in Section 604(2) of PERA has clearly been fulfilled then. As AFSCME also points out, it appears that the Association in making this argument is really claiming that Section 604(2) affords a rival union the right to demand a revote on the question of inclusion in the overall unit at any time. Although the Act is silent on the question of a revote, the Board has previously rejected this very same argument in favor of the two-part analysis set forth above in **Philadelphia School District (Get Set)**, 10 PPER ¶ 10006 (Nisi Decision and Order Dismissing Petition for Representation, 1978). As such, the Association's argument that an order of election should issue, as a matter of law simply based on Section 604(2) of the Act, is not persuasive.

The Association relies on **Fort LeBoeuf School District**, 16 PPER ¶ 16071 (Order and Notice of Election, 1985) for the proposition that its rival petition to split the professional and nonprofessional unit should be granted. However, **Fort LeBoeuf School District** is readily distinguishable, as the incumbent union in that case disclaimed any

interest in representing the petitioned for employees and waived its right to appear on the ballot. As a result, the Board Representative concluded that the incumbent effectively acquiesced in the severance of the nonprofessional unit from the professional unit. In the instant matter, there has been absolutely no disclaimer of interest by the incumbent, AFSCME, nor can it be claimed that AFSCME has even remotely acquiesced in the severance. Accordingly, the Association must show that either (1) the employees sought to be severed no longer exhibit an identifiable community of interest with the remaining employees, or (2) the interests of the group of employees seeking severance has not been fairly and adequately represented in the existing unit, consistent with **Berks County, supra**, for the Board to grant severance.

The Association has not alleged that the professional employees no longer exhibit an identifiable community of interest with the nonprofessional employees. Instead, the Association avers that the interests of the professional employees have not been fairly and adequately represented in the existing court-appointed bargaining unit. However, this contention is unsupported by the substantial, credible evidence of record.

The record shows that the 2011-2013 collective bargaining agreement includes a number of provisions that apply predominantly to professional employees, including provisions for stand-by time, shift differential, meal allowance, and reimbursement for mileage, parking costs, and for the difference between regular and business insurance rates. Similarly, under the 2011-2013 collective bargaining agreement, professional employees such as probation officers and domestic relations officers are paid on higher pay scales than their nonprofessional, clerical coworkers.

The record also shows that, during every round of contract negotiations since the court-appointed unit was certified, one or more professional employees have served on every negotiations team. What is more, a number of professional employees have served as president of Local 3206 since the court-appointed unit was originally certified, including Mr. Reichert, Ms. Stuart, and Mr. Styles. Further, there are three professional employees currently serving on the AFSCME Local 3206 Executive Board, while two out of three Local 3206 Trustees are also professionals.

The record further shows that in the current negotiations, AFSCME has made proposals to increase the stand-by rate of pay for professional employees, and the meal allowance rate, which affects mostly professional employees. In addition, the County has proposed elimination of the auto insurance reimbursement, which also affects mostly professional employees, and AFSCME has opposed that proposal. Prior to the start of the current negotiations, AFSCME surveyed its members seeking input through the submission of wish lists, regarding what sort of proposals they would like to make. And, during the negotiations, Ms. Luna personally asked a number of professional employees to provide input regarding proposals they would like AFSCME to make.

In addition, Ms. Sedora, the Local 3206 President, filed a grievance concerning the placement of certain professional employees on the pay scale shortly after ratification of the 2011-2013 agreement, which was ultimately resolved in favor of the professional employees. Those employees had their pay adjusted, and received back pay to make them whole for the error.

The Board has held that, where the parties' current collective bargaining agreement contains a number of provisions that deal with the peculiar working conditions of the professional employees; that during the current negotiations for a successor agreement the incumbent union has made several proposals that pertain only to the professional employees; and a professional employee has been a member of the bargaining team for the incumbent union in all of the negotiations for the collective bargaining agreements since the incumbent was certified as the exclusive bargaining representative, the interests of the professional employees have been fairly and adequately represented in the existing unit. **In the Matter of the Employees of Perry County**, 34 PPER 156 (Proposed Order of Dismissal, 2003).

On this record, AFSCME has not only satisfied each of the conditions from **Perry County**, but has gone even further in successfully prosecuting a grievance on behalf of

certain professional employees such that the professional employees received a wage adjustment and back pay, as well as having professional employees in numerous leadership positions in the local union. It is not significant that the provisions in the agreement which apply predominantly for the benefit of professional employees are not exclusive or unique to professional employees only and that nonprofessionals may also derive some benefit therefrom. The record clearly shows that there are several contractual provisions which predominantly benefit the professional employees and that AFSCME has made a number of proposals which primarily affect the professional employees. Therefore, it cannot be seriously contested that the interests of the professional employees have been fairly and adequately represented in the existing unit.

The Association presented testimony regarding a number of complaints the professional employees had with regard to AFSCME, including unanswered questions and changes to wage increases and health insurance benefits, as well as a purported failure to notify the entire domestic relations office of the ratification vote for the 2011-2013 agreement. (N.T. 18-25, 38, 64-66, 88) However, the contractual provisions at issue regarding wages and health insurance benefits clearly applied to both professional and nonprofessional employees alike, not just the professionals. (Association Exhibit 1, at p. 13, 37; N.T. 117-118) Likewise, the purported failure to notify the domestic relations employees of the ratification vote also affected both professional and nonprofessional employees. (N.T. 88). Thus, it can hardly be said that these issues support a conclusion that the interests of the professional employees have not been fairly and adequately represented, as they were not specific to the professional employees in any way whatsoever. The Board has held that testimony regarding general employee dissatisfaction with the incumbent union's representation does not establish that the interests of the employees at issue have been submerged in relation to those interests of the other employees as would warrant their placement in a separate unit. **Harrisburg School District**, 9 PPER ¶ 9125 (Nisi Decision and Order, 1978).

The Association also presented testimony purporting to show that AFSCME failed to address during contract negotiations any specific issues that are unique to the professional employees, including certification fees, weapons, clothing allowance, tactical gear, and life insurance or killed in the line of duty benefits. This argument is without merit. First of all, the County pays for the probation officers' certification fees each year. Also, the probation officers are not required to carry a weapon or to wear bullet proof vests, but the County provides that gear if they choose to do so. (N.T. 49-51, 53, 85-87). The Association has cited no authority for the proposition that the professional employees' interests have not been fairly and adequately represented simply because these existing terms and conditions of employment have not been codified into the collective bargaining agreement. Nor did any professional employees suggest a proposal relative to weapons, bullet proof vests, or certification fees. (N.T. 52-53, 84-87). While the Association did put on testimony that suggestions were made for proposals relative to a clothing allowance and life insurance benefit, (N.T. 52, 87), the Association has cited no authority for the proposition that AFSCME must pursue every suggested proposal of the professional employees, especially where the most recent agreement contains several provisions which apply primarily for the benefit of the professional employees and the incumbent union has continued to pursue consistent positions during ongoing negotiations.

Finally, the Association presented testimony from Mr. Nicholson, who is a probation officer, regarding alleged comments of Ms. Luna during a meeting of the professional employees. Specifically, Mr. Nicholson testified that Ms. Luna stated any proposals for wage increases or benefits for professionals could be put through, but they would easily be outvoted by the nonprofessional employees who were not getting the same benefits. (N.T. 125-126). Although I find the testimony of Mr. Nicholson to be, on balance, credible, his testimony is not accepted as credible or persuasive on this point, as it was successfully rebutted by Ms. Luna herself and Brenda Webb, who is an AFSCME organizer and who indicated that it was actually the professional employees that made those statements. (N.T. 115, 128-130).

In any event, the testimony offered by the Association on this point is not dispositive. It is well settled that testimony to the effect that the professional employes are outnumbered by the nonprofessional employes and therefore may not be able to prevail in voting to ratify a collective bargaining agreement which does not address their concerns does not establish that the professional employes have not been fairly and adequately represented. **In the Matter of the Employes of Perry County**, 34 PPER 156 (Proposed Order of Dismissal, 2003) *citing Commonwealth of Pennsylvania*, 8 PPER 50 (Nisi Decision and Order 1976). Mr. Nicholson did not testify that Ms. Luna said AFSCME would never make proposals that were specific to professional employes, but rather simply that it would be outvoted by the nonprofessionals if they did not get the same wage increases or benefits. Had Ms. Luna made such a remark here it would reflect nothing more than an acknowledgement that the professional employes might strike a better bargain for themselves if placed to a separate unit. The Board has specifically disapproved of this particular argument, as it is not persuasive evidence that the interests of the employes at issue are being submerged. *Id.*

Based on the foregoing, the Association has not demonstrated that the professional employes should be severed from the existing certified unit.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.
3. The Association is an employe organization within the meaning of Section 301(3) of PERA.
4. The Board has jurisdiction over the parties.
5. The interests of the professional employes have been fairly and adequately represented in the existing unit.

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 is dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twenty-fifth day of February, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner