

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-U-18-58-W
: (PERA-R-527-W)
KEYSTONE OAKS SCHOOL DISTRICT :

PROPOSED ORDER OF UNIT CLARIFICATION

On March 22, 2018, the Keystone Oaks Education Association, PSEA/NEA (Association or Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification pursuant to the Public Employee Relations Act (PERA or Act), seeking to include the Mental Health Therapists allegedly employed with the Keystone Oaks School District (District) in the professional bargaining unit certified at PERA-R-527-W.

On April 23, 2018, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on September 12, 2018. The hearing was subsequently continued to September 26, 2018 at the request of the Association and without objection from the District.

The hearing ensued on September 26, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. The Association filed a post-hearing brief on December 10, 2018. The District filed a post-hearing brief on December 12, 2018.

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 District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9)
3. The Association is the exclusive bargaining agent for a unit of professional employes who work for the District. (Exhibit D-7)
4. The Association and the District are parties to a collective bargaining agreement (CBA), which is effective from 2017 to 2020. (Exhibit D-7)
5. The District has had two school-based Mental Health Therapists since 2016, Sarah Hazlett and Danielle King. (N.T. 17, 57)¹

¹King testified that her legal name is Astfalk, but that she is known throughout the District as King. (N.T. 57).

6. Hazlett began working at the District in September 2016 and services the connected middle and high schools. Her office is located within the Guidance office in the high school building. She earned both her Bachelor's and Master's degrees in social work and is a licensed clinical social worker in Pennsylvania. (N.T. 17-20)

7. King started working at the District in August 2016 and services the District's three elementary schools, Fred L. Aiken, Dormont, and Myrtle Avenue. She obtained her Bachelor's degree in Psychology and her Master's degree in social work. She is licensed in Pennsylvania to perform social work and has a Home and School Visitor certificate from the Pennsylvania Department of Education. (N.T. 57, 66-67)

8. As Mental Health Therapists, Hazlett and King both report to the Supervisor of Pupil Services, Suzanne Lochie, and perform the same general functions. Their job duties include: conducting individual and group therapy with referred students; maintaining frequent and ongoing contact with students' families and the administration, and keeping records of the same; conducting assessments; developing crisis plans and providing crisis counseling; participating in students' Individual Education Plan (IEP) meetings; contributing to Student Assistance Program teams within their schools; and leading trainings and providing education for staff and parents on mental health-related topics. (N.T. 18-22; Exhibit A-1)

9. Hazlett and King are required to follow the District's calendar and adhere to the building hours, as well as attend meetings with Lochie at least on a monthly basis. (N.T. 22; Exhibit A-1)

10. Hazlett and King each have individual agreements with the District, which are dated June 27, 2017 and which purport to define their relationship as that of an independent contractor. The agreements provide for hourly wages, which the therapists receive regardless of how many students they work with on a particular day. The agreements state that Hazlett and King can work 192 days per school year, based on a schedule of five days per week at 7.5 hours per day. The agreements also permit the therapists to work up to 30 hours during the summer months, for which they must obtain preapproval. (N.T. 47; Exhibit D-5, D-6)

11. Hazlett and King follow a work schedule that is defined by the start and end times of the building, in which each individual therapist is assigned, and which mirrors the same hours the teachers work. (N.T. 24, 63, 111)

12. The District provides Hazlett and King with email addresses, phone numbers, and identification keycards, and lists them as staff on the Guidance Office webpage, alongside bargaining unit members, such as counselors. The District also provides Hazlett and King with computers and other supplies to perform their jobs, such as printers, papers, and pens. (N.T. 21, 45-46, 65-66; Exhibit A-2)

13. In performing their job duties, Hazlett and King regularly collaborate with members of the bargaining unit, including teachers, guidance counselors, and school nurses. They both participate in the Student Assistance Plan (SAP), a team-based approach to meeting the needs of students that includes counselors, administrators, the school nurse, a community liaison, and other support professionals. They also regularly contribute to IEP meetings with students in the District's special education program, which

involves collaborating with the student's special education case manager, regular education teachers, school administrators, and counselors to ensure the student is receiving the proper support. And, they maintain continuous contact with their students' teachers and counselors to keep track of their progress and in-class behavior. (N.T. 18-19, 22-25, 58-60, 64, 111-112)

14. At Lochie's direction, Hazlett and King attend in-service programs and professional development days along with teachers, counselors, and other professionals, as well as joint meetings with the Guidance department for training purposes. (N.T. 26, 50, 63-64)

15. Like the other professionals in the Guidance department, Hazlett and King must adhere to the guidelines promulgated by the District with respect to suicide and homicide assessments, student attendance, and child abuse reporting. They also play a direct role in the crisis response protocol by performing assessments and working directly with the student to resolve the immediate crisis. (N.T. 37-38, 49, 60-61)

16. Hazlett and King rely significantly on the guidance of Lochie, who as Supervisor of Pupil Services, oversees the SAP teams. Lochie attends the SAP meetings where the team discusses students who have been referred for mental health services. If a crisis occurs, Hazlett and King inform Lochie at each step of the process and sometimes call her as a resource. (N.T. 22-23, 37, 60-61; Exhibit A-1)

17. Hazlett and King attend monthly department meetings together with Lochie to provide her with updates on their caseloads and submit documentation at the close of each nine-week grading cycle, so that Lochie can monitor their caseloads. If either Hazlett or King have to leave school before the end of the day for any reason, they notify Lochie. Lochie also approves their planned absences and summer hours. (N.T. 39-42, 59, 75-77, 114-116)

18. Prior to Hazlett and King, the District used a third-party agency, Wesley Spectrum Services, to provide similar services to those provided by the Mental Health Therapists. Wesley Spectrum Services also provided a part-time supervisor. Lochie acknowledged that the District's decision to discontinue the use of an outside agency was motivated in part by the District's interest in directly supervising the Mental Health Therapists and maintaining control over their schedules. (N.T. 84-85, 104-105)

DISCUSSION

The Association has petitioned to include the Mental Health Therapists in the bargaining unit. The District opposes the petition on the grounds that the Mental Health Therapists lack an identifiable community of interest. The District also contends that the Mental Health Therapists are independent contractors, and therefore, not public employees eligible for inclusion under the Act.

Section 604 of PERA provides, in relevant part, 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:

(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.

43 P.S. § 1101.604.

In determining whether employes share an identifiable community of interest, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours and benefits, working conditions, interchange of employes, grievance procedures, bargaining history, and employes' desires. West Perry School District v. PLRB, 752 A.2d 461, 464 (Pa. Cmwlth. 2000). 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. *Id.* at 464.

In this case, the record shows that the Mental Health Therapists share an identifiable community of interest with the employes in the professional unit. The Mental Health Therapists work at the same District school buildings where the teachers, counselors, and school nurses work. Likewise, they share the same hours as the professional employes and work with students and parents, as well. Indeed, the Mental Health Therapists serve as members of the SAP teams, work collaboratively with the professional employes in the bargaining unit, and contribute to students' IEP meetings, along with the employes in the professional unit. In addition, the Mental Health Therapists attend in-service programs, professional development days, and joint meetings for training purposes with the employes in the professional unit. Moreover, the Mental Health Therapists have the same or similar educational and skill requirements as the professional employes, as Hazlett and King both possess advanced degrees and licenses. Although the District is quick to point out that the Mental Health Therapists do not follow a set curriculum or receive vacation, sick leave, health insurance, and retirement benefits, like the other professional employes in the unit, this is not enough to destroy the clearly identifiable community of interest based on the findings of fact set forth herein. See In the Matter of the Employes of Temple University Health System Episcopal Hospital, 41 PPER 177 (Order Directing Submission of Eligibility List, 2010) *citing* Pennsylvania State University v. PLRB, 24 PPER ¶ 24117 (Court of Common Pleas of Centre County, 1993) (the Board need not find an identical community of interest but merely an identifiable community of interest).

In fact, the record demonstrates that the Mental Health Therapists satisfy the definition of professional employes under Section 301(7) of the Act. By virtue of their duties conducting individual and group therapy with referred students; maintaining frequent and ongoing contact with students' families and the administration, and keeping records of the same; conducting assessments; developing crisis plans and providing crisis counseling; participating in students' IEP meetings; contributing to SAP teams within their schools; and leading trainings and providing education for staff and parents on mental health-related topics, the work of the Mental Health Therapists is predominantly intellectual and varied in character; requires consistent exercise of discretion and judgment; requires knowledge of an advanced nature; and is of such character that the output or result accomplished cannot be standardized in relation to a given period of time. See 43 P.S. § 1101.301(7). Therefore, the Mental Health Therapists, by operation of law, share an identifiable community of interest with the

employees in the existing professional unit. Indeed, the same factors, such as work performed, educational, and skill requirements, which support professional status also support the conclusion that the Mental Health Therapists in question share an identifiable community of interest with the existing bargaining unit of teachers, counselors, and school nurses. See In the Matter of the Employes of Temple University Health System Episcopal Hospital, 41 PPER 177 (Order Directing Submission of Eligibility List, 2010) citing In the Matter of the Employes of Riverview Intermediate Unit, 37 PPER 106 (Final Order, 2006) (holding that professional status of both the employes at issue and the employes in the existing bargaining unit speaks to the question of whether an identifiable community of interest exists).

As previously set forth above, the District also maintains that the Mental Health Therapists are independent contractors and not employes of the District. In determining whether a person is an employe or an independent contractor, the Board must determine whether such person is subject to the alleged employer's control or right to control with respect to her physical conduct in the performance of the services for which she is engaged. Pennsylvania Interscholastic Athletic Association, 11 PPER ¶ 11284 (Nisi Order of Dismissal, 1980). In Cox v. Caeti, 279 A.2d 756 (Pa. 1971), the Pennsylvania Supreme Court listed guidelines for determining this issue, including: whether payments are made by the job rather than the hour; whether the party contracted with uses her own equipment, tools, vehicle, etc.; whether the party contracted with pays and supervises her own workers; and whether the party contracted with does similar work for others. Cox, at 758; PIAA, 11 PPER ¶ 11284 at 473.

More recently, the Commonwealth Court has restated the test slightly differently, stressing the following factors: control of the manner in which work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether the work is part of the regular business of the employer; and the right to terminate the employment at any time. Beaver v. Coatesville Area School District, 845 A.2d 955 (Pa. Cmwlth. 2004).

In the instant matter, the record shows that the Mental Health Therapists are employes under the Act, and not independent contractors. First of all, the Mental Health Therapists receive hourly wages regardless of how many students they work with on a particular day. Likewise, the Mental Health Therapists do not provide their own equipment or tools, such as laptops, phones, printers, office space, and supplies like pens and paper. Instead, the District provides them with these supplies, along with District email addresses. (N.T. 45-46, 65-66). Furthermore, the Mental Health Therapists are not free to pay and supervise their own workers to perform their duties for the District. (N.T. 47). And, while Hazlett maintains her own practice during which she meets with clients in the evenings, her ability to do so is greatly limited due to the District's expectation that she will be present at her assigned location during building hours. (N.T. 54, 98-99, 114-118). Thus, as the Association notes, Hazlett would not be able to contract with another school district without terminating her relationship with the District here.² As such, the factors set forth in Cox do not support

²There is no evidence that King performs similar work for others.

a conclusion that the Mental Health Therapists are independent contractors, but rather employes eligible for inclusion in the professional unit.

In arguing for independent contractor status, the District asserts that Hazlett and King have complete control over the manner in which they provide services to students and that they are not directed by the District to obtain a set outcome or result for the students. However, this argument ignores the nature of their work, which requires independent judgment and expertise in counseling children. Likewise, this contention is belied by the record, which evidences a clear right to control on behalf of the District. Indeed, the Mental Health Therapists are required to follow the District's calendar and adhere to the building hours, as well as attend meetings with Lochie at least on a monthly basis. Their agreements state that Hazlett and King can work 192 days per school year, based on a schedule of five days per week at 7.5 hours per day. The agreements also permit the therapists to work up to 30 hours during the summer months, for which they must obtain preapproval. At Lochie's direction, Hazlett and King attend in-service programs and professional development days along with teachers, counselors, and other professionals, as well as joint meetings with the Guidance department for training purposes.

Hazlett and King also attend monthly department meetings together with Lochie to provide her with updates on their caseloads and submit documentation at the close of each nine-week grading cycle, so that Lochie can monitor their caseloads. If either Hazlett or King have to leave school before the end of the day for any reason, they notify Lochie. Lochie also approves their planned absences and summer hours. Lochie even acknowledged that the District's decision to discontinue the use of an outside agency to provide mental health services was motivated in part by the District's interest in directly supervising the Mental Health Therapists and maintaining control over their schedules. Finally, the work of the Mental Health Therapists is part of the regular business of the District, as they constitute members of the SAP team, which has the broad goal of providing services to meet the needs of students and to support them in the learning process. (N.T. 34-35, 90). Accordingly, the Mental Health Therapists must be deemed employes under the Act, and the unit will be amended to include the position.

CONCLUSION

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

1. The District is a public employer within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Mental Health Therapists are public employes within the meaning of Section 301(2) of PERA and share an identifiable community of interest with the employes in the existing unit.

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 unit certified at PERA-R-527-W is hereby amended to include the position of Mental Health Therapist.

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 and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this 17th day of April, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN POZNIAK, Hearing Examiner