

ANDREWS AND BEARD

EDUCATION LAW REPORT

Published in Cooperation with the Pennsylvania School Study Council, Inc.

Volume VI, Number 3

February 2011

Exceptions for Supervisory and Confidential Employees in Recent PLRB Cases

In two recent cases, support personnel associations filed unit clarification petitions that sought to add positions to their nonprofessional units of School District employees. These cases provide an excellent opportunity to review the issues associated with unit clarifications and we will take the opportunity to explore these issues briefly through a discussion of these cases.

In the matter of the employees of *Elizabeth Forward School District* the PLRB considered whether or not employees in the position of Technology

Support II should be included into an existing nonprofessional unit of School District employees. In this case the District opposed the petition and argued that Tech IIs were supervisory employees within the meaning of Section 301(6) of the Public Employee Relations Act. The District based its argument on the claim that the Tech IIs provided solicited information on the evaluation of a Tech I employee and that the Tech IIs also assign work to the Tech I employee as evidence that the Tech IIs also constituted supervisors under the Act.

However, the PLRB concluded that neither circumstance was sufficient to establish supervisory status for the Tech II employees. The Hearing Examiner based his decision on the grounds that the Tech IIs do not make effective recommendations with regard to the hiring, firing or discipline of employees. Further, very little time is actually spent by the Tech IIs assigning tasks to the Tech I. Finally, the Hearing Examiner held that the Tech IIs share an identifiable community of interest with the other employees in the nonprofessional unit.

In his Findings of Fact, the Hearing Examiner held that the Tech IIs do not evaluate other Tech employees, they do not effectively recommend employees for hire, and have no role in receiving or processing grievances. Although present during interviews of a network manager and another Tech II, the scores of all current Tech IIs sitting in the interview were averaged with the Director of Technology scores. Although they had

(Continued next page)

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Exceptions Continued from page 1

input, the Tech IIs had no final say in the matter as the Director of Technology effectively recommended candidates for hire in the District.

Section 301(6) of the Public Employee Relations Act defines a supervisor as “any individual having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or adjust their grievances.” That being said, Section 604(5) of the PERA provides that the PLRB may take into consideration the extent to which supervisory and nonsupervisory functions are performed by employees when determining whether or not they qualify for this supervisory exception. The Pennsylvania Labor Relations Board will not find an employee to be a supervisor where they exercise their supervisory authority only sporadically. In order to be supervisor, the PLRB has consistently held that he or she must actually exercise authority as set forth in Section 301(6) of the PERA and that this authority must carry with it the power to reward or sanction employees.

Because the Tech IIs do not have the ability to discipline, reward, or sanction other District employees, the PLRB held that they were not supervisory employees. Further, the PLRB was influenced by the fact that the Tech IIs are not directly involved in evaluating the Tech I employee or have any effective input into recommendations for the hiring of a Tech I. In order to make an effective hiring recommendation, the recommendation must be given controlling weight and cannot be subject to an independent investigation by a higher authority. In this case, the Director of Technology had the controlling weight of opinion regarding the hiring decisions. As a result, the PLRB was not convinced that these employees could be excluded from the nonprofessional unit as a supervisory employee and as a result of their identifiable community of interest with other members of the nonprofessional unit, they should be included in said unit.

In another case, the Pennsylvania Labor Relations

Board considered a clarification petition that attempted to include a payroll employee that the District had classified as a confidential employee into the Association. In that case, the original hearing officer clarified the unit to include the payroll position; however, the PLRB later vacated that decision and held that the employee should have retained his or her confidential status and should not be included into the unit. The Association claimed that the District had been scattering confidential duties among employees in order to keep employees out of the bargaining unit.

However, the PLRB held that the evidence showed that the payroll position in this case worked in a close and containing relationship with the Business Manager who was associated with the collective bargaining on behalf of the employer, thus making the employee a confidential employee under the Act.

This case, known as *In the matter of the employees of Brandywine Heights School District*, the PLRB held that a payroll employee who was tasked with costing out certain bargaining proposals for negotiations and worked very closely with the Business Manager throughout the year should have been a confidential employee. At the time of the dispute, the District already had a confidential employee in place as the secretary for the Business Manager and another one in place as the secretary for the Superintendent. However, the District also claimed that the payroll secretary was qualified as a confidential employee as well.

The Commonwealth Court has held that an employee may be deemed confidential under Section 301(13) without evidence that the employee became privy to the employees’ collective bargaining strategy. Under this section of the PERA, a confidential employee “is any employee who works... in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.” Thus, the Hearing Examiner, who partially held that the employee did not qualify because she was not privy to the District’s collective bargaining strategy and only had access to costing out information, was in error. The Commonwealth Court has clearly held that the Act does not require

(Continued page 4)

Removal of Bargaining Unit Work by School District Not Unfair Labor Practice

In a recent claim before the Pennsylvania Labor Relations Board, a District's Education Association alleged that the District violated sections 1201(a)(1) and (5) of the Public Employe Relations Act when it unilaterally removed bargaining unit work without bargaining. In *Chambersburg Area Education Association and the Chambersburg Area School District*, the PLRB held that the District did not violate sections 1201(a)(1) and (5) of the Public Employe Relations Act where it did not unilaterally remove bargaining unit work.

In this case, the Association claimed that the District made the decision to subcontract certain new positions to an independent contractor for three elementary schools. By the end of the 2008-09 school year, the District had employed school counselors to provide counseling services to students at several elementary schools. This service also included the employment of a social worker to provide their professional services to these students as well. However, at the beginning of the 2009-10 school year, the District stopped utilizing these employees and instead obtained the services of a subcontractor to provide these same services.

The Pennsylvania Employe Relations Act provides that an employer will commit an unfair labor practice under sections 1201(a)(1) and (5) where it unilaterally transfers bargaining unit work to non-members of the bargaining unit where the bargaining unit work had been performing that work on an exclusive basis previously. In order to substantiate this claim, unilateral action is a necessary element of the charge and no charge may be sustained if there is not unilateral action by the employer.

Although the record demonstrates at the beginning of the 2009 school year the District began using employees of a subcontractor to provide services previously provided by the bargaining unit, the record never established that the District acted unilaterally. The Association never presented evidence that the

District's use of these employees was in fact unilateral at any time. Without evidence demonstrating that the District acted unilaterally, this charge could not be sustained. As a result, the claim against the District was dismissed for lack of proof.

This case provides several important warnings to Districts. First, it stresses the importance of ensuring that if they are going to subcontract bargaining unit work that they comply with the requirements of the Pennsylvania Employe Relations Act. Subcontracting bargaining unit work is not a simple task and should not be done without the assistance of counsel. Further, the Association's error illustrates the importance of thorough documentation and evidentiary support before moving forward with a claim. In this case, the burden was on the Association to prove that the District acted unilaterally. Without putting forth any evidence regarding this matter, the Association has provided no record with which to support its claim generally. Thus, the Pennsylvania Labor Relations Board was without a choice but to dismiss the claim, as one of the most important prongs of the test regarding a violation of the Act was not met. Good recordkeeping by the Association could have allowed them to present evidence in support of their case. However, at the same rate, good recordkeeping by the District would allow the District to rebut the Association's claims. Thus, it is of the utmost importance that the District maintains records of meetings regarding labor relations matters with the Association in the event the need ever arises to defend the District's actions in front of the Pennsylvania Labor Relations Board.

Exceptions Continued from page 2

that the information accessible to the employee rise to the level of strategy; so long as the employee has a close and continuing relationship with a District employee who is a representative of the District during collective bargaining. The Commonwealth Court reasons that employees who have a close and continuing relationship with managerial personnel who actually participate in collective bargaining on behalf of the public employer would have the ability to access confidential information.

Thus in this case, the District Business Manager, who made recommendations to the District negotiation committee and collective bargaining with both the professional and nonprofessional bargaining units and who also sat at the bargaining table during negotiations, was a representative “associated with collective bargaining on behalf of the employer.” Thus, under Section 301(13)(ii) of the PERA, the Business Manager clearly meets the first portion of the definition required by the Act. The next question that must be addressed by the PLRB is whether or not the employee works in a close and continuing relationship with the Business Manager. The PLRB has repeatedly held that employees that cost out bargaining proposals for negotiations and serve similar

functions as the payroll secretary serve in a close and continuing relationship with their supervisor. Thus, the payroll secretary in this particular case should not have been included into the bargaining unit.

A word of caution is appropriate at this time. Districts may not scatter confidential responsibilities among District employees in order to create a larger number of confidential employees than necessary. Where the District is found to engage in these sorts of activities, employees will be held to be non-confidential. However, in this case, there was no evidence of such scattering of duties; therefore, the payroll secretary could be excluded from the bargaining unit. Further, the PLRB held that it was not unusual for the Business Manager to require that the employee who conducts all payroll functions cost out the impact of bargaining proposals on payroll.

Districts must exercise caution when making determinations regarding who should and should not be included into the bargaining unit. Further, one lesson to be garnered from both of these cases is that Districts should have well thought out job descriptions and a rational distribution of responsibilities. Smart job descriptions and assignment of responsibilities can provide Districts with protection and guidance under many of the laws that impact District labor situations.

AAA Construction Arbitration Award Difficult to Appeal

In the matter of *Oley Valley School District v. Amthor Steel, Inc.*, a School District was appealing the Order of the Court of Common Pleas of Montgomery County granting Amthor Steel permission to confirm the arbitration award and denying the School District’s Amended Petition to Vacate the Arbitration Award. Amthor Steel had filed an arbitration claim against the School District for the balance due under the contract for supplying and erecting structural steel at the Oley Valley Middle School. The Commonwealth Court ultimately upheld the Court of Common

Pleas’ decision confirming the arbitration award and denying the Petition to Vacate.

On September 20, 2004, the parties to this case agreed to arbitrate among them through a construction arbitration panel of the American Arbitration Association. The parties selected three Arbitrators and held thirteen hearings beginning in late October of 2007. One of the Arbitrators for this case was also appointed to serve on an unrelated arbitration panel with another attorney who represented one of the parties before this current panel. The School District

objected to the Arbitrator remaining on the panel because the individual he was appointed to serve on an unrelated panel with represented Amthor in this particular issue.

Ultimately, the Arbitrator determined that he did not have to recuse himself from this case and they eventually issued an award on October 22, 2008 in favor of Amthor in the amount of \$1,951,817.50, plus interest as well as an additional \$60,410.40 for reimbursement of AAA administrative fees and Arbitrator expenses. About one month later, Amthor Steel filed a Petition to Confirm the Award in the Court of Common Pleas and Oley Valley filed a Petition to Vacate the Arbitration Award.

Before the Commonwealth Court, the School District asserted that the Court of Common Pleas erred in denying the Petition to Vacate because it was denied a fair hearing when the arbitration panel exceeded its authority. The District argued that it had an absolute right to appeal from the arbitration award and that the language of the contract explicitly preserved its right to a judicial forum and a trial on all arbitrated issues.

Like many construction contracts, the agreement with the contractor provided that any controversy or claim arising out of or related to the contract would be submitted to arbitration in accordance with the construction industry rules of the American Arbitration Association. The language of this agreement also provided that the award rendered by the Arbitrators was to be final and binding among the parties. However, the parties did agree to a set of supplementary general conditions that provided that both parties can agree to arbitrate the dispute through the construction arbitration panel of the American Arbitration Association or pursue the claim pursuant to the Uniform Arbitration Act of 1927.

The issue here arises because the standard of review for the Uniform Arbitration Act of 1927 and the Pennsylvania Uniform Arbitration Act, which replaced the 1927 Act, differs with the latter providing for a much more restricted review of arbitration awards. Under the Uniform Arbitration Act, arbitration awards may only be vacated or modified where it is shown that a party was denied a hearing or that fraud, misconduct,

corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award. Under Pennsylvania law, Courts have consistently held that an "Agreement to arbitrate in accordance with the rules of AAA is an agreement to proceed pursuant to common law arbitration." Thus, language that refers to the rules of AAA incorporates the standard of the Uniform Arbitration Act rather than that of the 1927 Act.

Thus, the Commonwealth Court held that the options under the supplementary conditions are clear and unambiguous. The parties could either arbitrate under the AAA rules and the standard of the Pennsylvania Uniform Arbitration Act or under the 1927 version of the Uniform Arbitration Act. Once the parties selected either the common law or contract law arbitration approach, the parties were bound by the standard of review applicable to the chosen form of arbitration.

The School District also had additional arguments regarding the contract limitations, the Steel Act, and compound interest for which it claimed that the arbitration panel's award should be vacated. By selecting the common law arbitration format, the School District was bound by a strict standard of review making it nearly impossible for the arbitration award to be reversed.

In fact, Arbitrators under the common law arbitration format are final judges of both law and fact, which means that an arbitration award is not subject to reversal for a mistake of either law or fact. As a result, neither the Trial Court nor the Commonwealth Court were able to retry the issues addressed in the arbitration proceeding or review the panel's disposition of the merits of the case. The School District contended that the arbitration panel improperly ruled upon several claims and that these improper rulings constituted an "irregularity" and would allow for review and vacation of an award under the common law arbitration rules. Under the common law arbitration rules, irregularity is defined as rendering a decision that demonstrates "such bad faith, ignorance of the law, and indifference to the justice of the result."

The School District argued that the arbitration
(Continued next page)

clause provided for a thirty day time period for filing an arbitration demand after the architect has rendered a final decision on the matter. Amthor notified the District that it was not going to submit its claims to arbitration in accordance with the contract but would wait instead until thirty days until substantial completion of the project.

However, Amthor did not submit its claims to arbitration until nearly two years after substantial completion of the project. As a result of this delay, the School District filed a Motion to Dismiss with the arbitration panel; however, the panel denied this request. Although the demand for arbitration was significantly outside the period provided for in the contract, the District was stuck with the arbitration panel's decision because the arbitrator's decision that the demand was not time barred would constitute an error of law or fact outside the scope of review.

Regarding the Steel Act provisions, the School District argued that it would be forced to violate the law because sufficient documentation was not provided regarding the steel purchased and used on the project in compliance with the Steel Products Procurement Act. The Commonwealth Court held that there is very little binding precedent regarding what exactly constitutes sufficient documentation to satisfy the prerequisites of the Steel Act. Thus, the District was stuck with this decision twofold. First, there was no way to actually demonstrate that this was a mistake of law and even if it were such a mistake it is not appealable under the common law arbitration rules.

The District also claimed that the arbitration panel exceeded its authority and should therefore be vacated when it awarded compound interest to Amthor. Generally speaking, Pennsylvania law does not approve of the award of compound interest on debt unless the parties expressly agree to it or it is authorized explicitly by statute. The Commonwealth Court held that they did not believe that the award demonstrated an award of compound interest; however, even if it did, the parties' contract provided for interest from the date payment was due and the arbitration panel had the responsibility of interpreting that provision of the contract. Again, even if the interpretation of

the agreement was erroneous, it is beyond the scope of judicial review. Thus the District is stuck with the arbitration panel's decision.

In turning to the claim that the Arbitrator should have recused himself from the panel, the Commonwealth Court placed no weight on this argument. In order to disqualify an Arbitrator or demonstrate bias, there must be a "direct relationship between a party to an arbitration proceeding and a designated Arbitrator." Such a relationship must be akin to a prior employer/employee relationship or attorney/client relationship. Simply because one Arbitrator was appointed to serve on an arbitration panel with the counsel of an opposing party, does not demonstrate a direct relationship. Thus this claim had no merit and was dealt with briefly.

This case demonstrates the importance of several issues for School Districts regarding construction contracts. First and foremost, we recommend that Districts should prefer to resolve all disputes in the Court of Common Pleas of their county. School Districts should be wary of arbitration clauses in all contracts, not just construction contracts. Andrews and Beard believes it is better to have a case with a School District determined by a jury of taxpayers rather than an Arbitrator who is familiar with the Architects, Engineers, or Contractors with whom the District contracts. Arbitration decisions are subject to strict standards of review and can rarely be overturned.

As this case demonstrates, Arbitrators can make decisions which seem to go against the very spirit of the contract; however, they are not subject to judicial review. Due to the extensive potential repercussions for Districts, all contracts should be submitted to the District Solicitor prior to approval of any contract by the Board of School Directors. Districts must also remember that the signature on the contract is not what is important, as Districts are bound upon an affirmative Board vote in favor of entering into the agreement. The signature is a mere formality. Contract language can result in extreme expense for Districts and in such difficult economic times great care should be exercised prior to entering into those agreements.

Impact of Recent ADA Claims Illustrate Importance of District Compliance with the Law

Often employers, including School Districts, fail to recognize the extent of their obligations under the Americans With Disabilities Act. Two recent cases among private employers illustrate these potential issues in the School Districts and the dramatic impact they may have financially for School Districts.

For instance, a large Pennsylvania construction company recently agreed to pay \$200,000.00 and provide additional remedial relief to settle a federal disability discrimination lawsuit. The employer made a conditional offer of employment to an equipment operator who had experience in the position for which he was hired and had demonstrated his ability to operate the required equipment during the job interview. However, the company sent the employee for a post-offer physical, where the company learned that the employee had insulin dependent diabetes. Once the employer learned about the potential employee's diabetes, it rescinded the job offer.

As part of the settlement, the company was required to modify its post-offer medical examination policies so that it would engage in an interactive process with applicants and their doctors to assess fitness for duty and to provide reasonable accommodations to qualified individuals with disabilities. Further, the company agreed that applicants with insulin dependent diabetes are not to automatically be excluded from employment as equipment operators.

Another employer, who operates many movie theaters across the country, agreed to a settlement in several private complaints filed with the Justice Department and the Justice Department's own investigation found that stadium style movie theaters failed to provide persons who use wheelchairs with comparable lines of sight to those of other moviegoers. The movie theater company has agreed to move seating in its facilities and to build all future designs in such a way that wheelchair accessible seating is provided throughout the facility so that those viewers in wheelchairs are able to enjoy the improved

sightlines offered by stadium seating.

This previous case serves as a good introduction as well to the upcoming implementation of the new ADA compliant building codes. On March 15, 2011, new design requirements that were previously submitted for public comment and have been given final approval by the Department of Justice will go into effect at that time. These new standards will affect future building projects.

The Americans With Disabilities Act continues to present many new and novel situations for School Districts and other employers. It is very easy for a School District to take an action in violation of the Americans With Disabilities Act. Employees should receive thorough and proper training on complying with the ADA. Districts must be aware of their obligation to engage in the "interactive process" once an employee or prospective employee has been identified as "disabled."

Andrews and Beard Education Law Focus

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Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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Education Law Report is published by Andrews and Beard Law Offices.

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