

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-U-09-137-W
: (Case No. PERA-R-07-523-W)
: :
NESHANNOCK TOWNSHIP SCHOOL DISTRICT :

ORDER

On October 27, 2011, Neshannock Township School District (District) filed exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification (POUC) issued on October 5, 2011.¹ In the POUC, the Board's Hearing Examiner granted in part the Petition for Unit Clarification filed by the Neshannock Education Support Professionals, PSEA/NEA (Association) and concluded that the position of Accounts Payable Clerk is not a confidential employe under Section 301(13)(i) of the Public Employe Relations Act (PERA) and therefore is properly included in the bargaining unit represented by the Association. The Association filed an Answer to the District's exceptions on November 10, 2011.

This matter arose on April 13, 2009, when the Association filed a Petition for Unit Clarification with the Board, seeking to include the positions of Secretary to the Superintendent, Secretary to the Assistant Superintendent, Secretary to the Director of Pupil Services and Accounts Payable Clerk in the bargaining unit comprised of all nonprofessional employes of the District that the Board certified at Case No. PERA-R-07-523-W. A hearing was held on October 7, 2009, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

On February 12, 2010, the Hearing Examiner issued a Proposed Order of Dismissal concluding that the positions of Secretary to the Superintendent, Secretary to the Assistant Superintendent, Secretary to the Director of Pupil Services and Accounts Payable Clerk were confidential employes within the meaning of Section 301(13)(ii) of PERA and were properly excluded from the bargaining unit. Based upon the disposition of the case, the Hearing Examiner did not address whether the positions would also be confidential under Section 301(13)(i) of PERA.

On March 2, 2010, the Association filed exceptions alleging, inter alia, that the Hearing Examiner erred in finding that the Accounts Payable Clerk was a confidential employe. The Board issued a Final Order on July 20, 2010, dismissing the Association's exceptions and affirming the Hearing Examiner's Order.

On August 13, 2010, the Association filed a Petition for Review with the Commonwealth Court challenging the exclusion of the Accounts Payable Clerk from the bargaining unit. In an Opinion and Order issued on June 14,

¹ On October 31, 2011, the District filed "revised" exceptions with the Board, stating that the District had erroneously referred to the position in dispute as the Payroll Clerk, instead of the Accounts Payable Clerk.

2011, the Commonwealth Court reversed the Board's decision in the Final Order that the Accounts Payable Clerk is confidential under Section 301(13)(ii) of PERA, and remanded the matter to the Board for a determination of whether the Accounts Payable Clerk is a confidential employe within the meaning of Section 301(13)(i) of the Act.

In the POUC, the Hearing Examiner concluded that the Accounts Payable Clerk is not a confidential employe under Section 301(13)(i) of PERA. Therefore, the Hearing Examiner ordered that the certification under Case No. PERA-R-07-523-W be amended to include the Accounts Payable Clerk in the bargaining unit represented by the Association.

Although the District excepts to the Hearing Examiner's decision regarding the Accounts Payable Clerk, the District's exceptions are untimely. Section 95.98(a)(1) of the Board's duly promulgated and published Rules and Regulations provides in pertinent part as follows:

A party may file with the Board within 20-calendar days of the date of issuance with the Board an original and four copies of a statement of exceptions and a supporting brief to a proposed decision issued under § 95.91(k)(1)(relating to hearings) or a nisi order issued under § 95.96(b)(relating to exceptions) certifying a representative or the results of an election. Exceptions will be deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions.

34 Pa. Code § 95.98(a)(1). When determining the timeliness of exceptions, the Board accepts substantial compliance with Section 95.98(a)(1) if there is independent, third-party evidence of timely deposit provided by either the United States Postal Service or a private courier appearing on the face of the mailing. AFSCME, Council 13 v. Commonwealth of Pennsylvania, Department of Transportation, 33 PPER ¶ 33027 (Final Order, 2001), *aff'd*, No. 138 C.D. 2002 (Pa. Cmwlth. 2002)(opinion not reported). Therefore, the Board will accept as substantial compliance with Section 95.98(a)(1) a United States Postal Service postmark or postmark cancellation, In the Matter of the Employes of Bethlehem Area School District, 39 PPER 124 (Order of the Board, 2008), or a private courier's shipping documentation indicating that the exceptions were mailed within twenty days of issuance of the proposed decision.² Department of Transportation, *supra*.

² Pursuant to the Supreme Court's holding in Miller v. Unemployment Compensation Board of Review, 505 Pa. 8, 476 A.2d 364 (1984), the Board will also accept a filing of exceptions as timely where the Board receives the exceptions one day after the expiration of the 20-day period for filing of exceptions where it is readily apparent that the exceptions were, of necessity, placed with the United States Postal Service or private courier at least one day earlier. Teamsters Local #764 v. Lycoming County, 37 PPER 14 (Final Order, 2006). However, the District's exceptions were received by the Board two days past the expiration of the 20-day period for filing of exceptions and, therefore, would not be timely under the Court's decision in Miller.

The Board did not receive the District's exceptions until October 27, 2011, which is twenty-two days after the issuance of the POUC on October 5, 2011. Further, the District did not include a United States Postal Form 3817 Certificate of Mailing with its exceptions and the envelope contained a private postage meter stamp rather than a United States Postal Service postmark or postmark cancellation. The Board has adopted the Pennsylvania Supreme Court's holding in Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999), and held that a private postage meter stamp is unreliable to establish the date exceptions were actually deposited in the United States mail. Department of Transportation, supra. Accordingly, the Hearing Examiner's POUC became final and binding on October 25, 2011, and the District has waived all issues on appeal. Id.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the District's exceptions as untimely filed.

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Order of Unit Clarification be and the same are hereby dismissed as untimely filed.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman and James M. Darby, Member, this twenty-first day of February, 2012. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.