

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
:  
: PERA-U-21-119-E  
: (PERA-R-95-592-E)  
SHIPPENSBURG AREA SCHOOL DISTRICT :

**PROPOSED ORDER OF DISMISSAL**

On June 30, 2021, the Shippensburg Area School District (District or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude two secretarial positions from a unit of nonprofessional employees, represented by the Shippensburg Area Educational Support Personnel Association (Association or Union), as confidential employees, pursuant to Section 301(13) of the Public Employee Relations Act (PERA or Act).

On August 4, 2021, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on November 29, 2021, if necessary. The hearing was continued multiple times without objection at the request of both parties.

The hearing eventually ensued on April 6, 2022, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The District filed a post-hearing brief in support of its position on June 22, 2022. The Association filed a post-hearing brief in support of its position on June 24, 2022.

The Hearing Examiner, on the basis of the testimony presented at the hearing, and from all other 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. 7)
2. The Association is an employee organization within the meaning of Section 301(3) of PERA. (N.T. 7-8)
3. The Association is the exclusive bargaining agent for a unit of nonprofessional employees at the District. (Association Exhibit 1; PERA-R-95-592-E)
4. On November 16, 1999, the Board Representative issued a Nisi Order of Unit Clarification, amending the certification at PERA-R-95-592-E, to include the positions of Business Office Assistant and Secretary for Personnel in the unit. The District voluntarily agreed to the inclusion of both positions in the unit after the Association filed a petition for unit clarification on April 16, 1999 seeking their inclusion. (Association Exhibit 3)
5. In support of its Petition for Unit Clarification, the District offered the testimony of Nicole Weber, who has been District's Human

Resources Director since December 2021. She previously worked for the District from August 2004 through October 2015 before leaving in 2015 to serve as Director of Assistance Operations at South Middleton School District where she oversaw human resources. From 2004 to 2006, Weber was a secretary to the special education director at the District. In 2006, she became the Business Manager for the District. (N.T. 14-15, 37-38)

6. Weber testified that the two positions at issue, the Business Office Assistant and the Secretary for Personnel, both work in her office, which is the Human Resources office, and are subject to the instant Unit Clarification Petition. Weber testified that the bargaining unit includes 149 employees and would be reduced to 147 if the positions are removed from the unit. (N.T. 16-18; District Exhibit 1)

7. Weber testified that she is part of the District's bargaining team for both the professional and nonprofessional units. At the time of the hearing, the District was currently bargaining a contract for the nonprofessional unit. Weber was not part of the District's bargaining team in her prior role at the District from 2004 to 2015. (N.T. 18-20, 38)

8. Weber described her current role on the District's bargaining team as being two-fold, to bring forward topics which the District feels are not working and to serve on a subcommittee to review salary options. She explained that she serves on the subcommittee with the District's Superintendent and Business Manager, along with three members of the District's School Board. She testified that the subcommittee works directly with three or four Association members. (N.T. 20-21)

9. Weber testified that, in her role as Human Resources Director, she is involved with specific strategies associated with the collective bargaining process. She described how her current challenge involves recruiting within the salary structures as they exist right now. She also identified healthcare benefits as another challenge. She testified that the District compares itself to other school districts as one strategy model to provide options. She also explained that the District utilizes internal data as another option. She testified that she views it as data collection from internal and external sources. (N.T. 21-22)

10. Weber testified that her two assistants, the Business Office Assistant and the Secretary for Personnel, are both currently in the Union and not involved in the collective bargaining process. She explained that she views it as a conflict of interest and has not included those two positions in any part of the negotiation data collection. Weber testified that she, herself, would be responsible for putting together any models if the District were to go to fact-finding as part of the negotiations process. She stated that she is not able to use her assistants to develop models or collect data. (N.T. 22-24)

11. Weber testified that not being able to use her assistants for these duties has created barriers for her. She described how her day is very busy with meetings and how the assistants have more flexibility to reach out to other districts and intermediate units to collect data. She explained that collecting the data herself is a challenge with her work schedule. (N.T. 24)

12. Weber testified that she receives email communications from legal counsel, but she does not share them with her assistants. (N.T. 25)

13. Weber testified that her two assistants handle numerous functions on a daily basis, including recruiting, onboarding, collecting required documents and clearances, along with administering leave balances and workers' compensation claims. She testified that her two assistants do not perform any job functions related to collective bargaining. (N.T. 25-26)

14. Weber testified that, as Human Resources Director, she conducts investigations into the employees in the nonprofessional unit. She described how she does not use her two assistants in that process because she sees them as being "on the same level" as the other employees in the unit. She testified that she types all the documentation, collects the data, and meets with the employees herself. She stated that she would like the two assistants to help with typing letters and documentation. (N.T. 26-27)

15. Weber testified that she also serves as the District's Title IX Coordinator, which involves leading investigations of employee and student conduct. She testified that her two assistants do not play any role in this process either. She explained how she has purposefully excluded them from the process and that she would welcome their support with things like typing letters and documentation. (N.T. 27-30)

16. Weber testified that she would like to involve her assistants in the collective bargaining process. She testified that she would like to use them to pull information, create documentation of options, review data, and identify challenges for the Human Resources department going forward. She indicated that she does not share any work product or strategy for negotiations with her assistants. (N.T. 30-31)

17. Weber testified that if she goes out on leave, there is nobody from her office to assist the District's Superintendent and Business Manager in negotiations. She testified that although her assistants would not be at the bargaining table, they could still provide data to the Superintendent and Business Manager in her absence. (N.T. 31-32)

18. Weber testified that she does not think it is possible for the District to have only one confidential employee in the Human Resources office. She testified that the positions "intertwine and backup each other." She described how the structure of the Human Resources office is set up so that if one assistant is not available, the other one can pick up those responsibilities. (N.T. 33-34)

19. Weber testified that, as Human Resources Director, she is very much involved in the District's hiring process. She testified that her two assistants are also involved as they post the positions and monitor the applications for both internal and external candidates. She explained that her assistants are not involved in the interview process, although they are sometimes involved with creating interview questions and the corresponding documentation of the same. (N.T. 34-35)

20. On cross-examination, Weber testified that, as part of the District's bargaining team, she sits at the table, along with the District's Superintendent and Business Manager, both of whom have their own confidential secretaries. She acknowledged that both of those confidential secretaries are available to assist with memorializing data to the extent the need arises at the table or in sidebars. She also acknowledged that both of those confidential secretaries are available to her if she wants something to be

memorialized during her collaboration with the Superintendent and Business Manager. (N.T. 38-40)

21. On cross-examination, Weber identified a marked-up job description for the position of Secretary to Director of Human Resources dated July 2016. Although she could not state whether it was the current School Board-approved job description, she agreed that it relates to one of the positions the District is petitioning to remove from the unit. She testified that the job description covers a wide range of duties and that the incumbent "has a full plate on a day-to-day basis." (N.T. 43-47; Association Exhibit 9)<sup>1</sup>

22. On cross-examination, Weber also identified a marked-up job description for the position of Business/Human Resources Office Assistant dated July 2016. She testified that Shannon Keetch holds the Business/Human Resources Office Assistant position, while Laura Fleagle is the Secretary to Director of Human Resources. (N.T. 47-50)<sup>2</sup>

23. On redirect examination, Weber testified that she does not work in the same building as the Superintendent or the Superintendent's confidential secretary. (N.T. 60-61)

24. In opposition to the District's Unit Clarification Petition, the Association offered the testimony of Lori Pomeroy, who has been employed as the District's Fiscal Assistant since 1998. She has also been the Association's Vice President for approximately 15 years. (N.T. 82-83, 91)

25. Pomeroy testified that she physically works in the District's Administration Building on Morris Street, which also houses the District's Human Resources department, along with a number of other departments and staff members. (N.T. 83-84)

26. Pomeroy testified that she is personally familiar with the everyday job duties of the Business Office Assistant. She identified as Association Exhibit 4 the July 2006 job description for the Business Office Assistant and testified that the job description accurately reflects the job duties for that position at the time. (N.T. 84-86; Association Exhibit 4)

27. Pomeroy identified as Association Exhibit 10 the July 2016 job description for the Business/Human Resources Office Assistant, which was a draft of the successor job description for the Business Office Assistant. She testified that the position is currently held by Shannon Keetch, who began working at the District around September 2020. Pomeroy testified that the job description in Association Exhibit 10 represents a full-time slate of duties. (N.T. 86-88; Association Exhibit 10)

28. Pomeroy identified as Association Exhibit 5 a July 2006 job description for the Secretary for Personnel position. She testified that the

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<sup>1</sup> The job description appears to relate directly to the Secretary for Personnel position listed in the Board's November 16, 1999 Nisi Order of Unit Clarification, as the words "for Personnel" are crossed out and replaced with "to Director of Human Resources," following the word "Secretary." (Association Exhibit 9).

<sup>2</sup> Once again, the job description appears to relate directly to the Business Office Assistant position listed in the Board's November 16, 1999 Nisi Order of Unit Clarification, as the words "Human Resources" have simply been added to the original job title. (Association Exhibit 10).

job duties contained in Association Exhibit 5 remain the job duties for that position to this day. She stated that those job duties are representative of a full-time position. (N.T. 88-90; Association Exhibit 5)

29. On cross-examination, Pomeroy described how she started working for the District in the Business Office Assistant position before moving to the Fiscal Assistant position. She explained that, from 1998 to around 2015 when the District first hired a Human Resources Director, the "Human Resources department" consisted of the two positions in question, along with hers. She testified that they worked together under the Business Manager. She described how she handled payroll and the two positions in question handled leave. She stated that there has still been a lot of collaboration even since the Human Resources Director was hired. (N.T. 92-93)

30. On cross-examination, Pomeroy testified that the Superintendent is not located in the Administration Building. She acknowledged that the Business Manager and Human Resources Director are located in the Administration Building. She testified that her primary duty as Fiscal Assistant is to serve as a payroll clerk, and she reports to the Business Manager. She indicated that the Business Manager also has a confidential secretary, along with three other secretarial positions, which are not confidential and which are included in the bargaining unit. (N.T. 97-100)

#### DISCUSSION

The District has petitioned to exclude the two human resources secretaries from the nonprofessional bargaining unit as confidential employees. The Association opposes the petition on the grounds that the human resources secretaries do not satisfy the definition of confidential employees under the Act. As the party seeking to exclude the human resources secretaries from the unit, the District has the burden of proving by substantial evidence that the asserted statutory exclusions apply. *Westmoreland County v. PLRB*, 991 A.2d 976 (Pa. Cmwlth. 2010) *alloc. denied* 17 A.3d 1256 (Pa. 2011). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. *Id.* at 980.

Section 301(13) of PERA provides as follows:

"Confidential employe" shall mean any employe who works: (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.

43 P.S. § 1101.301(13).

The District has not sustained its burden of proving that the human resources secretaries should be excluded as confidential employees pursuant to Section 301(13)(i) of the Act. Even assuming that the human resources secretaries work in the District's personnel offices for purposes of the first prong of the Section 301(13)(i) test, the record does not demonstrate

that they also have access to information subject to use by the District in collective bargaining.<sup>3</sup>

In Bangor Area School District, 9 PPER ¶ 9295 (Nisi Decision and Order, 1978), the Board explained as follows:

The second criteria of sub-part (i) is 'an employe who has access to information subject to use by the public employer in collective bargaining.' Our Commonwealth Court recently determined in Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. PLRB, 383 A.2d 546 (1978), that an employe who had access to personnel records and fiscal information such as budgets, proposed allocations of funds toward the employer's programs, salaries, and memoranda concerning proposed salary increments to specific employes was not a 'confidential employe' under the first test of Section 301(13) of the Act since the employe enjoyed no access to information subject to use by the employer which could be considered outside the 'public record.' The Board has similarly held that an employe does not have access to confidential collective bargaining information when (s)he simply takes basic data and compiles reports which may eventually be used in negotiations as the position of the employer when the person who compiles the basic data has no information which would be considered confidential as a result of that compilation. It is only when an employe is privy to the relevant determinations of the employer's policy that that person may be found to be confidential. The collective bargaining information must be of such a definite nature that the union would know of the employer's plans if said information is revealed. See West Jefferson Hills School District, 5 PPER 65 (1978); and Northgate School District, 9 PPER ¶ 9121 (1978).

In this case, the record does not show that the human resources secretaries are privy to the relevant determinations of the District's labor policy, nor do they have access to collective bargaining information of such a definite nature that the Union would know of the District's plans if said information is revealed. The human resources secretaries handle numerous functions on a daily basis, including recruiting, onboarding, collecting required documents and clearances, along with administering leave balances and workers' compensation claims. This is not confidential work under PERA.

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<sup>3</sup> During the hearing, the District offered the testimony of its Human Resources Director, Nicole Weber, to support its averments that the two secretarial positions are confidential under the Act. Weber did not begin working for the District as its Human Resources Director until December 2021, which was after the District filed the instant Unit Clarification Petition on June 30, 2021. Post-petition evidence is admissible where there has been no showing that the employer changed job duties merely to influence the Board's determination regarding the placement of the position in question. In the Matter of the Employees of Housing Authority of the City of Shamokin, 42 PPER 32 (Proposed Order of Unit Clarification and Proposed Order of Amendment of Certification, 2011) *citing* In the Matter of the Employees of Westmoreland County, 40 PPER 35 (Final Order, 2009). There is no indication that the post-petition evidence in this case was suspicious in any way or designed to influence these proceedings. Nor has the Association advanced such an argument.

And, although Weber testified at length regarding how she would like to involve her secretaries in the collective bargaining process, it is well settled that employees will not be excluded from bargaining units based on job duties which have not yet been performed. In the Matter of Employees of Pottstown Borough, 33 PPER ¶ 33192 (Final Order, 2002).

Indeed, the record is devoid of any evidence whatsoever that the human resources secretaries have any involvement in collective bargaining with the District's employees. Weber specifically testified that her two assistants do not perform any job functions related to collective bargaining. In fact, Weber testified that she does not use her assistants to develop models or even collect data to use in negotiations, nor does she share any work product or strategy for negotiations with her assistants.<sup>4</sup> This evidence is simply not sufficient to sustain the District's burden of proving the confidential exclusion and to deprive the employees of their rights under the Act. As the Association persuasively notes, there is no evidence that the District ever shared with the human resources secretaries how the District would use any information to which they had access at the bargaining table or what kind of bargaining strategies or proposals the District planned to make to the Union. Nor is there any evidence that the human resources secretaries ever saw bargaining proposals, performed any sort of analysis of the same, or were privy to communications between members of the District's bargaining team. On this record, the human resources secretaries are not confidential employees under Section 301(13) (i) of the Act.

Likewise, the District has not sustained its burden of proof under Section 301(13) (ii) of the Act. As the Board further explained in Bangor Area School District:

Sub-part (ii) of Section 301(13) concerns an employee who works in a 'close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.' We interpret this phrase to embrace only those employees who assist or act in a confidential capacity to persons who formulate, determine and effectuate management's policies in the field of labor relations. See West Shore School District, 3 PPER 1 (1973); and Northgate School District, *supra*.

The Pennsylvania Supreme Court has held that the exclusion under Section 301(13) (ii) is specifically limited to those employees who work in a close continual relationship with managerial employees who actually formulate, determine or effectuate the employer's labor policy. PLRB v. Altoona Area School District, 389 A.2d 553, 557 (Pa. 1978). The Commonwealth Court has found individuals to work in a close continuing relationship with a management official where the employees are part of the management official's

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<sup>4</sup> Of course, even if the human resources secretaries did collect data or even perform cost projections for the District's bargaining team, they would still not be confidential employees under the Act. See Lower Macungie Township, 39 PPER ¶ 59 (Order Directing Submission of Eligibility List, 2008) (employee not confidential simply because she takes data and compiles reports which may eventually be used in negotiations); Tunkhannock Area School District, 29 PPER ¶29023 (Final Order, 1997) (mere costing out of fringe benefit proposals insufficient to justify confidential exclusion); Trinity Area School District, 22 PPER ¶ 22125 (Final Order, 1991) (costing out potential proposals, without knowledge as to whether employer would make the proposals, is insufficient to justify exclusion).

personal staff and have access to his or her office files, or where the employes work directly for members of the employer's bargaining team and/or perform work related to collective bargaining on a regular basis. Neshannock Educational Support Professionals Ass'n v. PLRB, 22 A.3d 1103 (Pa. Cmwlth. 2011) *citing* Altoona Area School District, supra; North Hills School District v. PLRB, 762 A.2d 1153 (Pa. Cmwlth. 2000); Commonwealth ex rel. Gallas v. PLRB, 636 A.2d 253 (Pa. Cmwlth. 1993) *aff'd*, 665 A.2d 1185 (1995). In North Hills, the Court expressly stated that "[w]here an employee has a close relationship with such involved management personnel, the PERA appears to assume that the employee would have access to confidential information, so that their 'inclusion in the bargaining unit would seriously impair the public employer's ability to bargain on a fair and equal footing with the union.'" *Id.* at 1159 *citing* PLRB v. Altoona Area School District, 389 A.2d 553, 557 (Pa. 1978).

Here, the record shows that the human resources secretaries work for the Human Resources Director, who is a member of the District's bargaining team and therefore qualifies as a public officer associated with collective bargaining. However, the District has not demonstrated that the human resources secretaries have a close continuing relationship with the Human Resources Director, as required by Section 301(13)(ii). The District has not offered any evidence of what the two secretaries actually do specifically for the Human Resources Director in order to establish a close continuing relationship. For example, there is no credible evidence that either of the two secretaries proofread, copy, or shred documents for Weber, nor is there credible evidence that they open her mail, type her correspondence on a regular basis, answer her phone, or have access to her email, computer, or office files. Instead, the record shows that Weber has intentionally shielded the two secretaries from any sort of duties that even have a potentially tangential relationship to bargaining, which effectively rebuts any statutory assumption or presumption that they have access to confidential collective bargaining information, as set forth in North Hills, supra. To be sure, Weber testified that she does not share emails with her secretaries and that she types her own documents and correspondence. This is simply not indicative of the close continuing relationship covered by Section 301(13)(ii).

On that point, the Board has specifically opined as follows:

While the finding of a close continuing relationship under Section 301(13)(ii) may be based on the totality of the circumstances, merely because a particular employe is a subordinate to a member of the employer's bargaining team, standing alone, is insufficient to establish a close continuing relationship under Section 301(13)(ii). There must be testimony or evidence of the employe's continuing duties for the employer's bargaining representative to justify assuming that the employe would, by sole nature of that relationship, have access to confidential collective bargaining information.

In the Matter of the Employes of Midd-West School District, 47 PPER 61 (Final Order, 2015).

As set forth above, Weber's testimony falls short of this burden of proof. Although Weber was certainly credible, on balance, when describing the two positions at issue, her testimony nevertheless compels a dismissal of the instant Petition, as she unequivocally and repeatedly noted how the two



secretaries are completely screened from any and all bargaining related matters. Not only has the District failed to present evidence then of the secretaries' continuing duties for Weber, but the testimony of Weber has also destroyed any potential assumption that the secretaries have the type of close continuing relationship necessary for an exclusion under Section 301(13)(ii). In fact, Weber's testimony specifically and convincingly refuted any potential inferences to be drawn from the job descriptions, which were admitted as exhibits. Moreover, neither party contends that the job descriptions should yield any inferences at all. To the contrary, the District instead argues in its post-hearing brief that the job descriptions cannot be credibly relied upon, as they were clearly outdated and unapproved by the School Board. (See District's Brief at p. 18-19). As such, Weber's testimony has been specifically credited over the job descriptions, which are not entitled to any significant weight. Accordingly, the District has not shown that the human resources secretaries are confidential under Section 301(13)(ii) of the Act, and as a result, the District's Petition for Unit Clarification must be dismissed.

#### **CONCLUSIONS**

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

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 hereto.
4. The human resources secretarial positions are not confidential within the meaning of Section 301(13) of PERA and are properly included in the bargaining unit.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing 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 days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 14<sup>th</sup> day of  
October, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak  
John Pozniak, Hearing Examiner