

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-21-224-E
 : (PERA-R-96-C)
STATE COLLEGE AREA SCHOOL DISTRICT :

PROPOSED ORDER OF UNIT CLARIFICATION

On September 24, 2021, the State College Area Education Association PSEA/NEA (Union or Association) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification under the Public Employee Relations Act (PERA or Act) seeking to include the newly created position of Mental Health Clinician in the bargaining unit of professional employees of the State College Area School District (District). On October 20, 2021, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on Friday, March 11, 2022, in Harrisburg. On November 23, 2021, I granted the Union's request to continue the hearing, without objection from the District, and I rescheduled the hearing for April 6, 2022. On March 31, 2022, I emailed the parties converting the hearing to a video hearing via Microsoft Teams. During the video hearing on April 6, 2022, both parties in interest had an opportunity to present testimony and exhibits and to cross-examine witnesses. On June 28, 2022, the Union filed its post-hearing brief. On July 29, 2022, the District filed its post-hearing brief.

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. 8)
2. The Union is an employee organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. The position of Mental Health Clinician (MHC) is a newly created position at the District beginning with the 2021-2022 academic school year. Elisabeth James holds the position of MHC. (N.T. 16-17, 81)
4. Ms. James' office is located in the District's High School, and she works primarily with High School students. She also counsels District students who do not attend the High School and are in other programs. She has a District Identification Badge. The District gives Ms. James access to a secretary and a computer. She does not provide any of her own equipment to perform her job. (N.T. 15, 34-35)
5. Ms. James has a Bachelor's Degree from Penn State University in Human Development of Family Studies with a minor in Psychology. She also has a Master's Degree in Education and Counselor Education with an emphasis on Clinical Mental Health in School and Community. Ms. James is required to hold a Master's Degree for her position at the District. (N.T. 11-12, 14, 87-88, 142-144; District Exhibit 17)

6. Ms. James has no professional licenses at this time. She has successfully passed the National Counselors Exam (NCE), which assesses knowledge related to diagnoses. The NCE applies toward her license, and she is currently working the necessary hours under supervision to qualify for her professional license. The District hired Ms. James contingent upon her obtaining her professional license, which cannot be obtained before 2 years of practice under supervision. (N.T. 41-42, 142-144, 146-148)

7. Ms. James' clinical supervisor is Dr. Seriashia Chatters. Dr. Chatters is the Director of Equity and Exclusivity at the District. As a pre-licensed clinician, Ms. James makes decisions based on her own judgment. Ms. James provides mental health counseling to students ages 14 and up based on the DSM III diagnostic manual. She plans treatment based on her diagnosis. Once licensed, Ms. James will diagnose and develop treatment plans without supervision. Ms. James handles crises such as suicidal ideation and homicidal ideation. She consults with faculty regarding faculty emergencies involving students. Dr. Chatters evaluates Ms. James on a weekly basis specific to pending cases. (N.T. 12-13, 15, 34-35, 40-41, 45-47, 120-121)

8. Ms. James works directly with students on a daily basis. She provides individual counseling to students based on her supervisor-approved individual treatment planning which she develops from the students' DSM-III diagnosis, along with consultation with faculty (including psychologists and counselors) about ways to support a student, if the student agrees.¹ Guidance Counselors refer students to Ms. James for mental health services. Ms. James facilitates individual or group counseling for students who are experiencing problems in school, at home, or in the community. (N.T. 30-32, 43, 45-47, 59-60)

9. Ms. James does not participate in IEP meetings. She does not enter into fee agreements with students for services. She is paid by the District. She does not have a separate contract with the District. Ms. James' role is different than the role of employees in special education. She does not provide learning support. Ms. James treats anxiety, depression, and personality disorders, by helping students understand themselves and by providing coping strategies. Special education focuses more on how a student's medical diagnosis impacts learning. Ms. James treats students clinically for mental health. (NT. 32-33, 35-36, 45-47)

10. Once Ms. James is licensed, the District plans to bill insurance companies, with which she is on-panel or in-network, for her services. The District does not do that now. If that occurs in the future, the District will receive the insurance reimbursement, not Ms. James. (N.T. 60-61)

11. Shai McGowan is the Union President, and she teaches mathematics at the High School. At some point, Ms. Harris, an administrator, told Ms. McGowan that the District would not include the newly created MHC position in the bargaining unit of professional employees because Ms. James did not have to be certified by the Pennsylvania Department of Education (PDE) and the MHC refers to their students as clients. (N.T. 20-21)

¹ MHC records are HIPPA protected medical records, and the MHC does not share student information with the counselors, unless the student agrees to a waiver. (N.T. 126)

12. Sometimes, Ms. James works beyond the normal school day if a student needs to be placed in a facility, if parents need to be contacted, or if parents come to the school. Ms. James can use flex time to come in late or leave early if she works beyond the normal school day. Ms. James works in-service days and sometimes receives training on those days. Ms. James is not required to attend in-service training. Ms. James does not supervise any District employes, and no District employes report to Ms. James. Ms. James is not a management level or supervisory employe. (N.T. 35-37, 134, 150-151)

13. Teachers work beyond their contractually designated workday when school is in session at home and at the District. Teachers are expected to respond to student and parent emails after school hours. Ms. McGowan, a teacher, has remained at school until 7:00 p.m. responding to emails and doing lesson plans. Teachers are allowed to come to work late if they have an early prep period. (N.T. 151-154)

14. Jeanne Knouse is the Director of Student Services at the District, and oversees the Integrated Mental Health System. The Integrated Mental Health System has an internal and an external group of individuals. The external mental health team meets every 2 weeks and consists of outside contracted providers. The external team determines the level of support for students on a case-by-case basis. The external providers no longer had openings for District students. The District created the new MHC position beginning the 2021-2022 school year to fill the void created by the unavailability of external providers. (N.T. 52, 55-56)

15. The District's internal team ("Tier 2 Team") is comprised of building principals, special education teachers, school psychologists, and counselors who refer students to the external mental health team providers. The mental health team providers determine the nature and type of mental health support. School psychologists and guidance counselors have PDE certifications. (N.T. 55-57)

16. With diminishing and limited capacity for openings with the external providers, the District needed better direct access to mental health supports. So, the District hired an MHC. An MHC can diagnose and treat mental health conditions that are derived from the DSM-III, like anxiety and depression. A school psychologist can diagnose 13 categories related to special education, but not anxiety or depression. School psychologists primarily focus on academics, career opportunities, and social-emotional learning. School psychologists do not provide mental health therapy. (N.T. 58-59)

17. When District School Counselor Sue Marshall retired from the District, the District did not replace her. The District instead eliminated her position and created the position of MHC. There is an overlap between what Ms. Marshall did as a counselor and what Ms. James does as an MHC. (N.T. 89, 101; District Exhibit 9)

18. Consistent with the job description for the position of MHC, Ms. James addresses issues such as school attendance, illegal drug use, illegal alcohol use, depression, anxiety, and adjustments to the social setting in school. School psychologists and counselors also address issues related to attendance, drugs, alcohol, and social-emotional issues. (N.T. 63-65; Association Exhibit 2)

19. Linda Pierce is the District's Human Resources Director. Ms. Pierce testified that teachers either have PDE certifications or are operating under an emergency certification towards certification. In addition to teachers, librarians, guidance counselors, home school visitors and school nurses have PDE certifications. Ms. James is not required by PDE to hold a certification, the District does not require her to have one, and she is not working towards a PDE certification. (N.T. 67-70, 72-73, 142-144)

20. Sections 1101 of the School Code contains a list of positions deemed professional under the School Code. This Section includes the position of school secretary as professional, as well as dental hygienist and nutrition program specialist. (N.T. 74-75; District Exhibit 2)

21. Section 1101 of the School Code provides, in relevant part, as follows:

(1) The term "professional employe" shall include those who are certified as teachers, supervisors, supervising principals, principals, assistant principals, vice-principals, directors of career and technical education, dental hygienists, visiting teachers, home and school visitors, school counselors, child nutrition program specialists, school librarians, school secretaries the selection of whom is on the basis of merit as determined by eligibility lists and school nurses.

24 P.S. § 11-1101.

22. A PDE certification for the position of social worker is new this year. The District, for many years, had social workers in the bargaining unit without PDE certification. PDE certification is relatively new for school nurses who also have always been in the bargaining unit of professional employes. (N.T. 102-103, 113)

23. When Ms. James started at the beginning of the 2021-2022 school year, the District planned to have her work 190 days per academic year at 7.5 hours per day, which is the same work day and year as the teachers. The mental health program soon became overwhelmed, and the District increased her work year from 190 days to 216 days. The District has since hired 2 more MHCs. (N.T. 85-87; District Exhibits 6 & 7)

24. The MHC evaluation form is different than the evaluation form used for school counselors and school psychologists because the duties and responsibilities of the MHC do not fall within the rubric used for counselors and psychologists. (N.T. 121-122; District Exhibits 13 & 15).

25. The District refers to students, who receive services from the MHC, as clients. Students who are MHC clients have different rights than students who receive services from a school psychologist. A school psychologist can discuss a student's assessments and testing results with parents. A client of an MHC, 14 years of age and older, can prevent parental access to their mental health records. An MHC diagnoses students/clients in terms of mental health. A school psychologist assesses students' impediments to learning. (N.T. 127-129, 138-140)

DISCUSSION

The Union petitioned the Board to clarify the bargaining unit of professional employes at the District to include the position of MHC. The District maintains that the MHC does not have an identifiable community of interest with employes in the professional bargaining unit, as required by Section 604 of PERA. The District contends that a lack of an identifiable community of interest is demonstrated by a number of factors. According to the District, the MHC, although required to have a Master's Degree and work with students, is not professional under the School Code definition and does not work with students in an educational capacity. (District Brief 6-7). The District maintains that the MHC's duties are different than other employes in the professional unit; the MHC does not instruct students or address academic issues; the MHC is not required to have a PDE certification, or to be supervised by someone with a PDE certification, like other employes in the professional bargaining unit; and the MHC is evaluated differently because the job duties have different requirements. (District Brief 7-8).

The District emphasizes that the MHC is a clinician who treats clients without interacting with teachers, psychologists or special education employes. (District Brief 7). The District also maintains that the MHC does not participate in IEP meetings; the MHC does not have a typical work schedule or attend in-service days, like other members of the bargaining unit. (District Brief 7). Also, the District notes that market salary rates for an MHC are significantly higher than the salary schedule in the CBA would permit. (District Brief 8). During the hearing, the District asserted that the MHC position is not managerial or supervisory. Those issues, therefore, are not under consideration here. Although the District asserts that the MHC supervises interns through the Penn State Health Program, (District Brief 7), those interns are not employes of the District and no evidence was adduced regarding the elements of a statutory supervisor under PERA.

The Board has rejected the argument that a PDE certification is required for, or relevant to, a determination of professional status. In the Matter of the Employes of Erie City School District, 33 PPER 33089. (Final Order, 2002). The Board has also rejected the argument that the School Code definition of professional employe is a consideration in determining the professional status of a school district employe. Id. In Erie School District, the employer argued that certain extra-curricular positions were not professional because the employes in those positions were not required to hold a PDE certification. The Erie School District Board cited to its decision in Belle Vernon Area School District, 31 PPER 31017 (Final Order, 1999), where the Board reversed a hearing examiner's determination that "because the position did not require PDE professional certification under the Public-School Code, the position was not professional for purposes of PERA." Belle Vernon, *supra*. In reversing the examiner, the Board concluded that the definition of professional employe in the School Code is not binding on the Board's determination of professional employe status under PERA and that a lack of PDE certification is not dispositive of the determination of professional status of the position under consideration. Erie, *supra*. Indeed, school nurses have always been in the professional bargaining unit, at this District and districts throughout the Commonwealth, based on the definition of professional employe in PERA, PDE certification for school nurses is new, and nurses do not provide instruction or academic support. To the extent that school nurses provide wellness and treatment to students so they can focus on academics, the same can be said for the MHC.

A copy of Section 1101 of the School Code was admitted as District Exhibit 2. This Section provides a list of administrators and other positions that the School Code identifies as professional employees.² Given the changes in public school services over the past several generations since the enactment of the School Code in 1949, the list of positions referred to as "professional" in that Section cannot be an exclusive or exhaustive list of positions considered professional. Moreover, this Board has concluded that athletic trainers and other positions are professional employees and properly included in a professional bargaining unit, even though they are not listed in Section 1101 of School Code as professional employees, lack PDE certification, and are not involved in academic instruction. Erie, supra; Armstrong School District, 40 PPER 19 (Proposed Decision and Order, 2009) (concluding that physical therapists and occupational therapists are professional employees and share an identifiable community of interest with other professionals). See also, In the Matter of the Employees of Wyoming Area School District, 40 PPER 109 (Proposed Decision and Order, 2009) (concluding that athletic trainers are professional employees and that the Board does not rely on school code definition of professional).

Also, secretaries, who this Board does not consider professional under Section 301(7) of PERA, are listed as professional employees under Section 1101 of the School Code. Accordingly, only the definition of professional employee under Section 301(7) of PERA governs the determination of whether a position is professional, and not whether the position is listed in Section 1101 of the School Code or whether the position requires a PDE certification. Occupational therapists, physical therapists, school psychologists, athletic trainers, and mental health therapists, all of which have been included in professional bargaining units by the Board and its examiners, are not listed in Section 1101 of the School Code as professional employees.

The District's position, of relying on Section 1101 of the School Code to determine which positions are professional, would produce incongruous results. Under the District's view, the MHC at the District, who is required to have a Master's Level education, exercises judgment and discretion (and is soon to have a professional license) would not be a professional employee, while a school secretary, who is not required to have post-graduate or specialized education and training and whose work is predominantly clerical and routine in nature, would be a professional employee. Under the District's theory in this case, the secretaries at the District would have to be moved to the professional bargaining unit while the MHC would have to be placed in the non-professional unit, where neither of those employee positions is managerial or supervisory.

Furthermore, the Board has concluded that the position of Mental Health Therapist, which is similar to the MHC in this case and which is not a school psychologist or a school guidance counselor, is a professional employee included in the professional bargaining unit. In the Matter of the Employees of Keystone Oaks School District, 50 PPER 78 (Proposed Decision and Order, 2019). Also, career coordinators are professional employees under PERA, and that position is not listed in Section 1101 of School Code. Professional employees share an identifiable community of interest with other professionals, by operation of law. In the Matter of the Employees of Spring-Ford Area School District, 47 PPER 103 (Proposed Decision and Order,

² The latest amendment to that Section was in 2019, and appears to include the same list of positions.

2016) (concluding that the college career coordinator position shares an identifiable community of interest with the employees in the existing professional unit because the same factors, such as work performed, educational, and skill requirements, which support professional status also support the conclusion that the college career Coordinators share an identifiable community of interest with the existing bargaining unit of teachers, librarians, counselors, nurses, and athletic trainers) (citing In the Matter of the Employes of Temple University Health System Episcopal Hospital, 41 PPER 177 (Order Directing Submission of Eligibility List, 2010) and In the Matter of the Employes of Riverview Intermediate Unit, 37 PPER 106 (Final Order, 2006)).

Section 301(7) of PERA provides as follows:

"Professional employe" means any employe whose work: (i) is predominantly intellectual and varied in character; (ii) requires consistent exercise of discretion and judgment; (iii) requires knowledge of an advanced nature in the field of science or learning customarily acquired by specialized study in an institution of higher learning or its equivalent; and (iv) is of such character that the output or result accomplished cannot be standardized in relation to a given period of time.

43 P.S. § 1101.301(7). The test is conjunctive, and all four parts must be met in order for an employe to be deemed professional under PERA. In the Matter of the Employes of Luzerne County Community College, 37 PPER 47 (Final Order, 2006).

Applying the law to the facts in this case, I conclude that the position of MHC is a professional position under PERA and that the position shares and identifiable community of interest with other employes in the professional bargaining unit, notwithstanding Section 1101 of the School Code or PDE certification.

Although the District has hired a total of 3 MHCs, MHC James' educational background as well as her duties and responsibilities were entered into the record as representing anyone holding the MHC position. The MHC position "requires knowledge of an advanced nature in the field of science or learning customarily acquired by specialized study in an institution of higher learning or its equivalent." 43 P.S. § 1101.301(7) (iii). Ms. James is required to hold a Master's Degree in Clinical Mental Health in School and Community.

Ms. James' work "is predominantly intellectual and varied in character," and it requires consistent exercise of discretion and judgment," under Section 301(7) (i & ii) of PERA. Ms. James, under the supervision of Dr. Chatters, diagnoses anxiety and depression under the DSM III, based on assessing and evaluating the unique circumstances of different individual clients who are also students at the District. Once licensed, Ms. James will have even more independence. She does treatment planning based on diagnoses tailored to the individual students/clients. Ms. James makes decisions based on her own judgment and discretion. Ms. James handles crises such as suicidal ideation and homicidal ideation. She consults with faculty regarding faculty emergencies involving students. Ms. James works directly with students on a daily basis; She provides individual counseling to students based

on individual treatment planning developed from the students' DSM-III diagnoses and based on the individual needs of each student/client.

Additionally, Ms. James' work is "of such character that the output or result accomplished cannot be standardized in relation to a given period of time." Each student's/client's case is unique because each individual has different condition(s); each client comes from different family experiences and backgrounds; each client has had different social experiences that influence their condition(s) and behavior; each client has different responses to their different environments and experiences. The complexity of each individual case precludes any type of standardization in treatment or consultation over any given time period of treatment. Accordingly, Ms. James and the position of MHC meets all four parts of the conjunctive test of professional employe under PERA. Therefore, Ms. James, as a professional employe, shares an identifiable community of interest with the other professionals in the bargaining unit. Riverview I.U., supra; Spring-Ford, supra.

Ms. James shares an identifiable community of interest with the employes in the professional bargaining based on other factors as well. In determining whether employes share an identifiable community of interest, as required by Section 604(1) of PERA, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours, benefits, working conditions, interchange of employes, grievance procedures and bargaining history. FOP v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999). An identifiable community of interest can exist despite differences in wages, hours and working conditions or other factors. Id.

Ms. James works in the District High School with the other professional employes and has a District issued badge. She is paid a salary by the District, and the District provides Ms. James with a secretary and computer and other office equipment. Contrary to the District's argument, Ms. James also interacts and consults with other professionals in the bargaining unit such as school psychologists, counselors and teachers, with client permission. The District eliminated Ms. Marshall's counselor position, which was a bargaining unit position, to create Ms. James' MHC position. The record shows that there is an overlap between some of the duties of Ms. Marshall's former counselor position and Ms. James' MHC position.

Also, Ms. James directly works with students/clients on a daily basis like teachers, although not in an academic or instructional capacity, and communicates with parents. Like teachers, Ms. James sometimes works beyond the normal school day, and attends in-service training days, although she is not required to do so. Ms. James also addresses some of the same issues with students/clients as school Counselors and school psychologists, such as school attendance, illegal drug and alcohol use, and social-emotional matters. Like the athletic trainers in Wyoming, supra, and the physical therapists and occupational therapists in Armstrong, supra, the fact that the MHC is not involved in the academic arm of school services or instructing students does not weaken or prevent a finding that the MHC is professional and shares an identifiable community of interest with other professional employes.

Ms. James' work year was extended from 190 days, like the teachers, to 216 days (i.e., 26 days longer) and her salary is not on the bargained for salary scale. However, these minimal facts do not outweigh the overwhelming other factors establishing a community of interest. As a new position, the MHC of course would have no placement on the salary scale in the CBA, and the salary is properly the subject of bargaining until the new position is placed on the salary scale. The fact that the market salary for the MHC position is substantially higher than the market salary for other positions currently in the bargaining unit and on the negotiated pay scale only emphasizes the District's duty to bargain a higher salary for the MHC with the Union.

The fact that the MHC's specific duties and responsibilities may differ from that of a teacher or a school psychologist does not destroy an identifiable community of interest with other professional employees because every different professional job classification has different job duties associated with that position. Whether the MHC is not involved in academic instruction is not a consideration under Section 301(7) of PERA. And the Board has placed mental health therapists, psychologists, counselors, athletic trainers in professional bargaining units, even though their specific duties are different from the specific duties of teachers.

The District points to the fact that the evaluation form for the MHC is different than evaluation forms for school psychologists and counselors because the rubric for those positions has to be different based on the different functions and responsibilities of those positions comparatively. Again, the difference in the evaluation forms for different positions is to be expected where the focus and responsibilities of those jobs are indeed different. Although not part of the record, it is also possible that the teachers have a different evaluation form than the school psychologists and school counselors who are all in the same professional unit together, but have different job functions.

Accordingly, the position of Mental Health Clinician is a professional employe under Section 301(7) of PERA, shares an identifiable community of interest with other professional employees, and is properly included in the professional bargaining unit represented by the State College Area Education Association.

CONCLUSION

The Hearing 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 Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The employees in the position of Mental Health Clinician are professional employees under Section 301(7) of PERA, share an identifiable community of interest with the other employees in the professional bargaining unit and are properly included in the professional bargaining unit certified

by the Board at PERA-R-96-C with the State College Area Education Association as the certified exclusive collective bargaining representative.

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 granted, and the bargaining unit description is hereby amended to include the position of Mental Health Clinician in the professional bargaining unit certified by the Board at Case Number PERA-R-96-C.

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 fourth day of August, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Jack E. Marino
JACK E. MARINO, Hearing Examiner