

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION SIX**

YOUNG SCHOLARS OF WESTERN PA	:	
CHARTER SCHOOL,	:	
	:	
Employer,	:	
	:	
and	:	Case No. 06-RC-210615
	:	
YOUNG SCHOLARS OF WESTERN PA	:	
EDUCATION ASSOCIATION, PSEA/NEA,	:	
	:	
Petitioner.	:	

**PETITIONER’S RESPONSE IN OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW OF DECISION AND DIRECTION OF
ELECTION**

The Petitioner, Young Scholars of Western PA Education Association, PSEA/NEA, pursuant to Section 102.67(f) of the Board’s Rules and Regulations, hereby submits this Response in Opposition to Employer’s Request for Review of Decision and Direction of Election, as follows.

Factual and Procedural Background

The Petitioner filed the Representation Petition in this matter on November 29, 2017. The Petition seeks an election among a proposed unit of professional employees of the Employer at its charter school facility located in Baldwin Township, Allegheny County, Pennsylvania.

The Employer raised various issues relating to the inclusion or exclusion of certain positions in the proposed professional unit. In particular, and germane to the Employer’s Request for Review, the Employer sought to: (1) exclude seven Coordinator positions as managerial, and (2) exclude employee Christine Kostosky on the basis that she held a paraprofessional position.

The Regional Office conducted a hearing on December 7, 2017. The parties were present and represented by counsel. Both parties had a full and fair opportunity to present the testimony

of witnesses and other evidence in support of their positions on all issues and to cross-examine the other party's witnesses. Following the conclusion of the hearing, the parties submitted post-hearing memoranda to the Regional Office.

On December 29, 2017, the Regional Director issued her Decision and Direction of Election. In relevant part, the Decision and Direction of Election held that: (1) each of the seven Coordinators was non-managerial and therefore eligible to vote, and (2) there was insufficient evidence to determine the eligibility of Kostosky, who would be permitted to vote subject to challenge.

On January 5, 2018, the Employer filed its Request for Review of Decision and Direction of Election and supporting documents in this matter. The Employer also filed a Request for Stay of the Regional Director's Decision and Direction of Election concurrently with its Request for Review. This Response in Opposition to Employer's Request for Review of Decision and Direction of Election is filed in opposition to the Employer's Request for Review and Request for Stay in this matter.

The Regional Director Correctly Held That The Employer Failed To Establish That Any Of The Seven Coordinator Positions Was Managerial

The record established that the Employer employs five Cluster Coordinators, one ESL Coordinator and one Title I Coordinator. The Employer asserts that the Regional Director incorrectly relied on the established NLRB standard for managerial status rather than relying on Pennsylvania state public sector law, such that the Regional Director erred in concluding under established NLRB law that the Coordinators were non-managerial.

The Employer suggests in its Request For Review that, since the Board has exercised jurisdiction over charter schools since 2012, the Board does not have sufficient caselaw to

determine questions of managerial status under the NLRA. The Employer goes on to posit that the Board should rely on caselaw developed in Pennsylvania under the Pennsylvania Public Employee Relations Act [Title 43 P.S. §§1101.101 -1101-2201; hereinafter referred to as the “PERA”]. The Employer goes on to suggest that the Pennsylvania administrative and judicial determinations applying the PERA’s definition of “management level employe” (43 P.S. §1101.301(16)) should be given weight in concluding that the positions at issue are managerial (see, Request For Review, p. 5, Paragraph 20).

Although the Employer criticized the Regional Director’s reluctance to look to Pennsylvania state law in making her determination, the Employer blithely ignored the fact that the Regional Director: (i) undertook a detailed factual analysis of the record evidence regarding each of the Coordinator positions, (ii) set forth the well-established standard for managerial status under the NLRA, (iii) properly placed the burden on the Employer to prove its claim that these positions were managerial, and (iv) applied the correct legal standard under the NLRA to the facts to conclude that the Employer had failed to meet this burden. The Request For Review simply sidesteps this analysis and instead puts forth an argument that its position would be treated more favorably under Pennsylvania state law.

The Employer’s argument is premised on the ill-founded proposition that existing NLRA jurisprudence is insufficient to tackle the problem of determining the managerial status of employees in a Pennsylvania charter school. The Petitioner respectfully submits that the premise is not only incorrect but legally insufficient to support the request for review.

The Regional Director analyzed the Coordinator positions under the definition of managerial status whereby a managerial employee is one “who formulates and effectuates high-level employer policies or has discretion in the performance of their jobs independent of their

employer's established policy, citing *General Dynamics Corp.*, 213 NLRB 851, 857 (1974) and *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The Regional Director went on to explain that although the Board has no firm criteria for determining managerial status, "an employee will not ordinarily be excluded as managerial unless he or she represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." (D&DE, pp. 6-7, citing *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000)). The Employer never explains how the Regional Director's analysis departed from the established Board law and federal caselaw on the subject; the Employer simply suggests that the Regional Director's analysis should be replaced by an analysis focusing on Pennsylvania state law.

With due respect to the Pennsylvania administrative and judicial decisions cited by the Employer, the Regional Director applied the correct legal analysis and arrived at the correct result under NLRA law; to wit, the Coordinators are teachers who have some ancillary duties to liaison between the staff and management. On each of the points raised by the Employer (curriculum changes, budgetary responsibilities, implementation and revision of policies), the Regional Director examined the record evidence and found that this evidence failed to demonstrate managerial status.

As the Regional Director explained, at page 7 of her Decision, the cluster meetings appeared from the descriptions to be collaborative with the Coordinator performing a liaison-style function. The record established that the position of Cluster Coordinator had just been introduced for School Year 2016-2017, and much of the Employer's argument was directed to what they believe the Cluster Coordinators will eventually be tasked to perform rather than a focus on what the Cluster Coordinators are actually doing. This was especially true with respect to the Employer's claim that Cluster Coordinators have managerial responsibilities for budget

preparation. The record revealed that the Cluster Coordinators do not now, and never have, performed any budget duties, but the Employer apparently intends to place these duties on the Cluster Coordinators sometime in the future. The Regional Director correctly noted that where the actual duties differ from the job description, the Board will focus on the actual duties (D&DE, p.8, citing *Pacific Lutheran University*, 361 NLRB No. 157 (2014))¹.

The Employer does not address this well-reasoned analysis of the record evidence. The Employer deflects attention from the record by asserting that federal policy under a national law should give way to the caselaw arising under the labor statutes of one state. The problem for the Employer in this case was not the legal standard that applied; the problem was the absence of record evidence to prove that the individuals holding these positions actually exercise said authority. The result would not be at all different under the Pennsylvania state standard. See, e.g., *School District of the City of Philadelphia v. PLRB*, 719 A.2d 835, 839-40 (Pa. Commw. 1998) (where employer's claim that employee had authority to perform managerial function is unsupported by record evidence of actual exercise of authority, PLRB properly concluded employee was non-managerial under PERA).

The Employers sole argument is based on the notion that the Board will reach a different result by relying on and applying Pennsylvania state law to the question of the managerial status of the Coordinators. However, the threshold problem for the Employer is that the record was devoid of evidence that the Coordinators actually exercised any of the authority that the Employer portrayed as applicable to their positions. In this circumstance, the Board will rely on actual duties rather than paper authority in a job description. It would not ultimately matter which standard was

¹ The Regional Director noted, at p. 8 of her D&DE: "The job descriptions of the Cluster Coordinator, without evidence of the actual formulation and effectuation of the Employer's policies, express theoretical authority. However, this type of authority will not support a finding of managerial status."

applied where the only managerial authority is on paper – these employees do not exercise actual managerial authority and should therefore be included in the unit. The Board should deny the Employer’s Request For Review.

The Regional Director’s Determination Regarding the Behavior Specialist/Special Education Paraprofessional Should Not Be Disturbed

The parties agreed, and the Regional Director concluded, that the currently-vacant position of Behavior Specialist is a professional position that should be included within the unit. Kostosky was hired as a Special Education Paraprofessional with the expectation that she would fill the position if and when she obtained the required credentials, but that she would perform the duties of both the Behavior Specialist and the Special Education Paraprofessional. Kostosky was recently hired, and the duties that she performs have been in a state of flux.

Inasmuch as Kostosky performs some of the duties of the professional position, and in view of the incomplete record on the actual duties, the Regional Director determined that Kostosky should vote subject to challenge. The Employer asserts that all of the duties that Kostosky performs are paraprofessional in nature and therefore it should be possible to determine her status. The Employer’s assertion once again avoids the actual determination by the Regional Director. In this case, the Regional Director concluded that Kostosky performs both professional and non-professional duties, and this conclusion has ample support in the record. As a result, there is no basis to disregard the Regional Director’s conclusion.

Conclusion

The Petitioner respectfully submits that the Employer's Request to Review the Regional Director's Decision and Direction of Election should be denied. The Employer failed to meet its burden to demonstrate that the Coordinator positions were managerial, and the Regional Director properly concluded that those positions were non-managerial and entitled to be included within the petitioned-for unit. In addition, the Regional Director's conclusion permitting the Christine Kostosky to vote subject to challenge is amply supported by the record.

Inasmuch as the Request For Review should be denied, the Employer's separate Request For Stay (which is based on the same reasoning advanced for the Request For Review) must also be denied.

Respectfully submitted,

Eberle & Bundick, LLC



Robert A. Eberle, Esquire

Pa. S. Ct. ID #47359

P.O. Box 44290

Pittsburgh, PA 15205

412-368-5541

bob@eblaborlaw.com

Attorney for Young Scholars of Western PA
Education Association, PSEA/NEA

