

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE:

KENT COUNTY VOCATIONAL TECHNICAL SCHOOL : Representation Petition
SPECIAL EDUCATION INSTRUCTIONAL AIDES : No. 91-06-065

The Board of Education of the Kent County Vocational Technical School District (hereinafter "District") is a public employer within the meaning of section 4002(n) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (as amended 1990, hereinafter "Act"). The Kent Vo-Tech Education Association, Inc., DSEA/NEA (hereinafter "Association") is the exclusive bargaining representative of the public employer's professional employees, including teachers, guidance counselors and school nurses.

On June 19, 1991, the Association filed a representation petition seeking to place an unorganized group of five Special Education Instructional Assistants (hereinafter "Aides") into the existing bargaining unit of approximately 69 certified professional employees. The petition was verified by the Public Employment Relations Board (hereinafter "PERB") as being properly supported by at least 30% of the petitioned for Aides. On August 12, 1991, the District filed with the PERB its opposition to the petition.

A hearing was held before the PERB on October 21, 1991, for the purpose of receiving evidence and argument concerning the appropriateness of amending the existing bargaining unit of certified professional employees to include Special Education Instructional Assistants. Closing arguments were simultaneously filed by the parties on November 18, 1991.

STATUTORY AUTHORITY

The criteria to be considered when determining an appropriate bargaining unit are set forth at 14 Del.C. §4010, Bargaining Unit Determination, paragraph (d), which provides in relevant part:

In making its determination as to the appropriate bargaining unit, the Board or its designees shall consider such factors as the similarity of duties, skills, and working conditions of the employees involved; the history and extent of organization; the recommendations of the parties; the effect of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate.

ISSUE

Whether modification of the existing bargaining unit of certified professional employees, including teachers, guidance counselors and nurses, to include a previously unorganized group of Special Education Instructional Assistants would constitute an appropriate bargaining unit, as required by §4010(d) of the Act?

BACKGROUND

All of the petitioned for aides are classified as Special Education Instructional Assistants and are employed at the Kent Secondary Intensive Learning Center (hereinafter "the ILC"). The ILC is a program created...

....to meet the needs of unserved and underserved secondary aged students with severe learning and/or emotional-behavioral problems. The target population includes students between the ages of 14 and 20 who have failed or are at risk of failure due to a number of variables, and who need a more restrictive and intensive educational program. [Association Exhibit 1: Job Description, Special Education Instructional Assistant]

The majority of the students come to the ILC with a history of having been unsuccessful in regular public school programs.

The Job Description for Special Education Instructional Assistants provided as Association Exhibit 1 contains the following information:

DEFINITION OF POSITION: Provides assistance to the classroom teacher and other staff by performing a variety of tasks related to the physical and instructional needs of students and the operation of the total learning environment.

Duties and responsibilities are primarily instructional in nature; I.A. spend the majority of their time (more than 50% of assigned time) in the performance of curriculum-oriented instructional assistance directly to students in the total learning environment.

EXAMPLES OF DUTIES: Assists individual and small groups of students in various subject areas, e.g. reading, math, games; monitors students engaged in independent work or similar activities; advises teacher to individual student needs and discusses/suggests programming; counsels students towards attainment of goal; assist with behavior management, help maintain order and discipline and assist in managing the behavior of students.

Assists teacher in carrying out classroom activities; prepares instructional materials; assists in administering tests and examinations; may score and record information as well as assist in data collection.

Supervises students between classrooms, during lunch and in the supervision of loading and unloading of buses. May transport students to home or other destination as determined by the Coordinator or School Psychologist.

May perform clerical and non-instructional duties such as keeping daily attendance, collection and distribution of lunches, reporting of grades and reproduction of materials, however, such duties comprise a clear minority of the work day.

In addition to the five (5) Instructional Aides, the ILC classrooms are also staffed by six (6) professional employees. It is attended by 53 students, approximately 6% of the District's student population. (District Exhibit 5, "Categorical Representation").

POSITIONS OF THE PARTIES

Association:

The Kent Vo-Tech Education Association, Inc., DSEA/NEA, asserts that the expansion of the existing unit of professional employees to include Special Education

Instructional Assistants is appropriate under the requirements of 14 Del.C. §4010(d).

In support of its position that the Aides share similarities of duties, skills and working conditions with ILC teachers, the Association contends that these employees work the same days and hours; have the same amounts of student contact time during a normal school day; have the same lunch and planning periods; attend the same school activities (e.g. Open House); and attend the same inservice programs. ¹ It further alleges that these employees perform many of the same duties, including the instruction of students, administering of tests, grading of papers, disciplining of students, recommending of student suspensions, lunch room duty, communicating with parents, and helping in the planning of instruction. While acknowledging that aides do not directly assess students or prepare IEP's, the Association contends that the aides do provide data and input into these processes.

KVTEA argues that because of the similarities in duties, skills and working conditions, the aides chose to petition to join the professional unit, as it is the unit, in their opinion, most likely to adequately represent their interests. An independent unit was not considered because of the small number of instructional aides and the concern that this would lead to overfragmentation. Further, the Association contends that more differences than similarities exist between the aides and the other existing bargaining unit of custodians. It notes that aides and custodians do not have contact with each other, that custodians have no student contact, that these employees work different hours and days, that they do not share the same holiday or vacation schedule and that custodians do not attend the same staff functions as aides.

The Association notes that aides are currently member of the Association and the granting of this petition would extend their rights to include representation in collective bargaining. It asserts that the interests of the sub-group of aides will be

¹ The Association notes that neither ILC teachers nor aides are required to participate in the District's extended inservice days.

represented by the Association just as other minority groups (e.g., nurses, guidance counselors) are currently represented.

Finally, the Association argues that the inclusion of aides within the bargaining unit of teachers, nurses and guidance counselors would contribute to the efficient administration of the school district and would result in the necessity for only minor changes to the existing bargaining agreement with this unit. ²

District:

The District opposes the inclusion of Instructional Assistants in the existing bargaining unit of professional employees, asserting that the differences in required skills, duties and working conditions "clearly outweigh any similarities between the two groups". The District argues that professional employees and aides do not share similar responsibilities, duties and skills; the working conditions of the professional employees and the aides are very different; the basis of payment and term of employment for these employees are very different; the method of payment, work schedules and benefit areas such as holidays and vacation are not the same. The District further points out the protection of tenure is extended by state law exclusively to teachers and other professional employees while aides do not have the same protection. It documented during the hearing the differences between the professional employee appraisal system as required by the state and the district generated system used to appraise aides. [Source: Letter of Supt. Jeff Adams to PERB Executive Director, dated August 12, 1991]

Further, the District argues that teachers informally evaluate their aides and provide day-to-day direction and supervision. The District asserts that it depends upon teachers to monitor the aide's work, to recognize and attempt to correct

² The Kent County Vocational School District and the Kent Vo-Tech Education Association, Inc., are parties to a collective bargaining agreement whose term expires June 30, 1992.

problems and/or deficiencies, and to appraise the Administration of any performance related difficulties. The District also contends that including aides within the bargaining unit would require substantial modifications to the existing collective bargaining agreement. It concludes that the differences in required duties, skills, and responsibilities clearly outweigh any similarities between the two groups.

OPINION

In July, 1990, the Public School Employment Relations Act was amended to, among other things, extend its jurisdiction to those public school support personnel who elect coverage under the Act. In accordance with the provisions of §4002(m) and §4010, the Association filed its petition to represent the Instructional Aides with the PERB.

The facts in this case are largely undisputed, although each party has used these same facts to support its side of the argument. The District contends that its professional employees do not share a community of interest with non-professional employees, stressing the dissimilarities between the groups regarding certification, evaluation, method of compensation and benefits, working conditions and terms of employment. The Association uses identical evidence to stress the commonality between the groups, stressing the extent of student contact, the instructional nature of the positions, common working hours and daily schedules, common inservice programs and required school activities.

The District places heavy emphasis on the differences in required educational background, the Legislature's extension of tenure exclusively to professional employees and the extensive evaluation process for certificated professional employees mandated by the Department of Public Instruction in concluding that there are differences significant enough to justify the exclusion of non-professional positions from a bargaining unit of certificated, professional employees. It is

important to note, however, in weighing these factors, that the Legislature did not create a presumption that professionals and non-professionals are not appropriate for inclusion in the same bargaining unit.³ Rather, the PSERA requires that this Board consider "... such factors as the similarity of duties, skills and working conditions of the employees involved; the history and extent of organization; the recommendations of the parties; the effect of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate". The Board is charged with applying the factors set forth in the statute, based upon its experience and expertise, and making a determination which is premised on consistent reasoning and a weighing of the factors, resulting in a decision tailored to fit the particular facts of the case.

The only limitation placed on consideration of the enumerated factors and weighing of evidence is found at 14 DeL.C. §4010(d), wherein the Board is prohibited from including supervisors (as defined at 14 DeL.C. §4002(q)) in bargaining units with those they supervise. The District argues that the Instructional Assistants should not be placed in a unit with teachers because ILC teachers informally evaluate their aides and provide day-to-day direction and supervision. 14 DeL.C. §4002(q) defines a "supervisory employee" as...

... any employee of a public school employer who has authority in the interest of the public school employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

The contention that ILC teachers informally evaluate their aides and provide supervision and direction on a day-to-day basis is insufficient to meet the statutory

³ Such a statutory mandate is included in the National Labor Relations Act, as well as the statutes of many other states which are similar in purpose to Delaware's PSERA.

definition of supervisory employees. District witness Diane Sole, ILC Coordinator, testified on direct examination that it is the District's administration which determines the hiring and directs the assignment and utilization of aides. She further testified that teachers provide only informal input into the aides' evaluation process. No further evidence was offered as to the teachers' authority to act in the employer's interest in making personnel decisions affecting the Instructional Assistants.

A. Similarity of duties, skills and working conditions of the employees involved

The statute does not require that all employees in a bargaining unit perform identical functions for the employer, but rather that they share a community of interest which is premised upon similarity in duties, skills and working conditions. It is not disputed that Instructional Assistants are not teachers, that teachers are required to be certified and to have a higher level of education than aides, and that teachers are held to higher performance standards. Likewise it is not contested that teachers and Instructional Assistants work side by side as an instructional team at the ILC, providing instruction, guidance and discipline in the small group settings in which the school's special population's needs are best met. Testimony established that while it is the teachers who are responsible for planning, developing and implementing the educational plan, the aides play an important part in facilitating this process through their work with the teachers. Teachers and their aides share the same student contact hours, planning and lunch periods, and work the same 185 day annual schedule. Aides attend all faculty meetings at the ILC and attend the October, February and September inservice programs with ILC teachers. They share responsibility during the day for monitoring student behavior and insuring that the school environment is safe and appropriate for learning through attentiveness to disruptive behavior and the consistent enforcement of conduct expectations. Aides are charged with a variety of instructional tasks from working with small groups

reinforcing lessons and skills, administering and grading tests, monitoring students in a teacher's absence from the classroom, to recording information on individual daily interaction records for each student.

The District stressed the differences in the evaluation procedures used with teachers and aides as being a major impediment to their being represented within the same bargaining unit. Teachers are evaluated under a state developed evaluation format which requires three (3) direct observations of tenured teachers over the two year evaluation cycle, while aides are evaluated annually under a District generated format which does not require direct observation. It is undisputed that teachers are primarily responsible for student instruction and individual curriculum application. The more extensive evaluation procedure employed for teachers is consistent with this level of responsibility and with insuring that the educational product of the District is of at least consistent quality with that produced in other Delaware schools. While the Department of Public Instruction mandates that Delaware public school districts either use the DPI generated teacher evaluation system or a DPI approved alternative, the performance standards used in evaluating aides are within the control and discretion of the District. Further, all teachers and aides at the ILC are evaluated by the ILC Administrator. The evaluation procedure does not change or override the fact that teachers and aides at the ILC share the same working conditions and operate as a team in providing instruction to students. Because the similarities in the day-to-day working conditions and duties of these employees are so strong, the differences in the evaluation processes employed are not deemed sufficient to preclude a finding that the Instructional Assistants are appropriate for inclusion in a unit of professional certificated employees.

B. History and Extent of Organization:

The Instructional Assistants have never been organized or represented in

collective bargaining. There is, consequently, no bargaining history to be considered.

It should be noted, however, that under the by-laws of the Kent Vo-Tech Education Association, Inc., DSEA/NEA, the Instructional Assistants are eligible for membership and benefits in the association and are currently represented within the organization by a representative on the Executive Board.

C. Recommendations of the Parties

This factor is of no particular significance in resolving this matter, as the recommendations of the parties are not in agreement. There is no basis for concluding that the petition is not supported by a majority of the affected employees. The petition was properly supported by a showing of interest of at least 30% of the unrepresented aides. Further, the Association is the exclusive bargaining representative of the bargaining unit of teachers, nurses and guidance counselors. Notices were duly posted in public areas and the opportunity for comment, either for or against the petition, was available to any concerned employee.

D. Effect of Overfragmentation on the Efficient Administration of the District

The efficient administration of government requires designation of the fewest number of bargaining units under a single employer as is consistent with the statutory rights of public employees to organize and choose exclusive representatives to represent them in a meaningful and effective manner. Maintaining the fewest possible number of bargaining units enhances the efficient administration of a school district by assuring that collective bargaining results in some semblance of uniformity in benefits and working conditions as well as preventing a patchwork pattern of representation which would unduly complicate the process. Balancing the interests of the employer and the employees in this matter minimizes the time, expenditure and possible disruption of the educational process attributable to collective bargaining. Lake Forest E.A.v. Bd. of Education, Del.P.E.R.B.

Rep. Pet. No. 91-03-060 (7/2/91, p. 665). Further, both the rights of employees and the resources of the District are better protected by avoiding an unreasonable proliferation of small, discrete units.

The Kent County Vocational Technical School District is a relatively small district. It serves 961 students, employing a total of 69 teachers and 5 Instructional Assistants to meet the instructional needs of these students. Currently, there exist 2 bargaining units within the District: the first representing its teachers, nurses and guidance counselors; and the second representing custodial employees. Clearly the efficient administration of the District would not be served by the creation of a third bargaining unit consisting of only five employees. This is particularly so where the employees in question are classroom aides who are so closely allied with teachers in their daily responsibilities and interests. For this reason, a consideration of the effect of overfragmentation supports the petition.

E. Such other factors as the Board may deem appropriate:

In Lake Forest Education Association v. Bd. of Education (Del.PERB, On Review of Rep. Pet. 91-03-060 (8/15/91)), the PERB upheld the Executive Director's decision not to combine an existing bargaining unit of classified employees (consisting of secretaries, clerks, custodians and aides) with an existing bargaining unit of certified teachers and other non-administrative professional employees. In so ruling, the Board made a distinction between the two groups based upon their responsibility for student instruction. Because the petition sought the consolidation of all employees in both units, the determination that secretaries and custodians were particularly incompatible for inclusion with professional employees involved primarily in student instruction, was deemed sufficient to sustain a rejection of the petition. The facts in Kent Vo-Tech differ significantly from the fact situation in the Lake Forest case in a number of respects. First, the present petition is not complicated by a request to consider a wide diversity of positions for inclusion. The

petitioned for employees in this case include only Instructional Aides, who by their job description "... spend the majority of their time... in the performance of curriculum oriented instructional assistance directly to students in the total learning environment". The accuracy of the job description was corroborated by the testimony of both Association and District witnesses. Finally, the number of employees in question in this matter is small and they do not currently benefit from their statutory right to organize and be represented for the purposes of collective bargaining.

DECISION

For the reasons set forth above, it is determined that the petitioned for bargaining unit including teachers, nurses, guidance counselors and Special Education Instructional Aides is appropriate, as required by 14 DeL.C. §4010(d). The Association's petition is therefore granted.

In order to be certified as the exclusive representative of the previously unrepresented group of Instructional Aides, an election will be held within thirty days in order to determine whether the Instructional Aides desire to be represented for the purpose of collective bargaining by the Kent Vo-Tech Education Association, Inc., DSEA/NEA.

IT IS SO ORDERED.

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DATED: January 30, 1991