

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE:

Caesar Rodney Instructional Aides : Rep. Pct. No. 92-03-070

The Caesar Rodney School District (hereinafter "District") is a public school employer within the meaning of §4002(n) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1990, hereinafter "Act"). The Caesar Rodney Education Association is the exclusive bargaining representative of all of the public school employer's certified professional employees, except administrators, within the meaning of 14 Del.C. §4002(i).

A petition was filed on March 13, 1992, by the Caesar Rodney Education Association, seeking to place an unorganized group of Instructional Aides into the existing bargaining unit of 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. By letter dated April 3, 1992, the District opposed the modification of the professionals bargaining unit.

A hearing was held before the PERB on June 19, 1992, which was continued and concluded on August 17, 1992. The parties were permitted the opportunity to file closing arguments and supporting briefs. The final brief being received on October 26, 1992.

STATUTORY AUTHORITY

The criteria to be considered in 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 designee 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, except administrators, to include a previously unorganized group of Instructional Aides would constitute an appropriate bargaining unit, as required by §4010(d) of the Public School Employment Relations Act?

#### BACKGROUND

The Caesar Rodney School District consists of twelve (12) schools (one high, two junior highs, and nine elementary schools) organized into eleven (11) administrative units. The District administers the Kent County Intensive Learning Center for students with severe behavioral and emotional problems for grades four through nine (4 - 9). Additionally, the District provides a comprehensive program for autistic children which serves all of Kent County. The District served a student population of approximately 6,200 students in the 1991-92 school year.

The existing bargaining unit of professional employees includes approximately four hundred and ten (410) teachers, nurses, guidance counselors and all other non-administrative certified professionals. The petition presented by the Association is brought on behalf of approximately forty-three (43) instructional aides.

During the course of the two day hearing, the following documents were admitted into evidence in support of the parties' respective positions:

Association Exhibits:

- 1 Page 107 of the DPI Manual, Certification of Professional Public School Personnel, entitled Permits - School, Classroom Aides and Autistic Residential Child Care Specialists
- 2 1991-92 Instructional Staff Handbook of the Caesar Rodney School District
- 3 1991-92 Support Staff Handbook of the Caesar Rodney School District
- 4 1990-92 Agreement between the Board of Education and the Caesar Rodney Educational Association

District Exhibits

- 1 3/30/92 Listing of Instructional Aides as submitted to the PERB
- 2 6/18/92 Revised Listing of Instructional Aides
- 3 6/18/92 Listing of Non-Instructional Aides
- 4 Job Descriptions Supporting the Exhibit 2 Listing of Instructional Aides
  - 4(a) - Intensive Learning Center Aide
  - 4(b) - Level V Classroom Aide
  - 4(c) - Level V Classroom Aide/Lifeguard
  - 4(d) - Limited English Proficiency (LEP) Aide
  - 4(e) - Special Education Instructional Aide
  - 4(f) - Visually Impaired Aide
- 5 Job Descriptions Supporting the Exhibit 3 Listing of Non-Instructional Aides
  - 5(a) - Attendance Aide
  - 5(b) - Attendance/Computer Technician Aide
  - 5(c) - Clerical Aide
  - 5(d) - Latch Key Aide (draft)
  - 5(e) - Nurse's Aide
  - 5(f) - Library Aide
  - 5(g) - Playground Aide
- 6 Curriculum Development Policy - adopted 5/19/92
- 7 Performance Appraisal Documents
  - 7(a) - Teacher Evaluation Form 9 (DPI doc # 95-01/90/07/19)
  - 7(b) - Teacher Aide Evaluation Form
  - 7(c) - Clerical Evaluation Form
  - 7(d) - Chief, Custodian-Fireman and Custodial Evaluation Form
- 8 Insert from the 1991-92 Charlton School Teachers Handbook
- 9 Charlton School Policy on Confidential School Records - dated 11/15/78
- 10 Listing of Charlton Staff permitted to review student folders
- 11 Page 4 of a teacher's completed evaluation form, signed by Charlton Principal John Lister, dated 3/4/91
- 12 Examples of picture communication as used by Charlton students/staff
- 13 1991-92 Attendance and Substitute record of Charlton teacher who was out on extended leave beginning 11/6/91 and extending through 6/10/92

Subsequent to the close of the hearing the District submitted the following documents in response to the Board's request:

- 1 The list of Instructional Aides (Adm. Exh. 2) with positions and job description references noted
- 2 A list of Non-Instructional Aides (Adm. Exh. 3) with positions and job description references noted

- 3 A list of changes in these positions that have occurred since June 18, 1992, which notes, among other things, the three additional Computer Aides
- 4 The job description for Computer Lab Attendant (Aide), as reviewed by the CR Board of Education in 3/92
- 5 The draft job description for General Instructional Aide and Interpreter Aide

The Association presented testimony from the District Superintendent, three (3) teachers (one teacher of autistic students, one junior high ILC teacher who works with 11-14 years olds, and one teacher of mentally retarded 8 - 11 year old students) and six instructional aides (three Level V Classroom Aides from the Charlton School, one Charlton Level V Classroom Aide/Lifeguard, one Level V Classroom Aide from the High School, and one Intensive Learning Center Aide).

The District presented testimony from the District Superintendent, the District's Director of Personnel, the Principal of the Caesar Rodney Junior High School, the Principal of the Simpson and MacElvain Elementary Schools who is also in charge of the Simpson ILC, and the Principal of the Charlton School.

#### PRINCIPAL POSITIONS OF THE PARTIES

##### Association:

The Association's petition requests that the bargaining unit currently comprised of certified professional employees, except administrators, and represented by the Caesar Rodney Education Association, be amended to include the following positions as Instructional Aides:

Interpreter Aide	Intensive Learning Center Aide
General Instructional Aide	Level 5 Classroom Aide
Computer Lab Aide	Level 5 Classroom Aide/Lifeguard
Nurse's Aide	Special Ed. Instructional Aide
Library Aide	Limited English Proficiency Aide
Latch Key Aide	Visually Impaired Aide

In support of its petition, CREA argues that teachers and instructional aides work together as an interactive teaching team under identical working conditions. Instructional aides and teachers share the same student contact hours, lunch and

break periods; work the same academic year; attend the same inservice programs; operate under nearly identical handbooks; have identical authority to get medical and/or security assistance; and are each evaluated by either the building principal or assistant principal.

The Association argues the statute requires that bargaining units be combined to avoid overfragmentation if a community of interest exists and unless there is some compelling reason to reject such combination. It notes that in amending the statute and extending its provisions to all public school employees, the legislature did not create a presumption that bargaining units which contain both professional and non-professional employees are inappropriate. It further asserts that the District has failed to provide any convincing evidence or argument in support of the argument that a combined unit would be unmanageable or unreasonable.

The Association disputes the District's assertion that teachers are supervisors of instructional aides within the meaning of the Act. Relying on the PERB's decision in RE: Kent County Vocational Technical School District Instructional Aides (Del.PERB, Rep.Pet. No. 91-06-065 (1/30/92)) it concludes that the District has offered no proof that teachers exercise authority over instructional aides in the interest of the employer nor has the District delegated to the teachers authority over the instructional aides. It argues that the instant situation is analogous to one in which skilled employees have assistants and where the NLRB has held that unless the skilled employees have been granted supervisory authority over such things as hiring and firing, these employees are not supervisors.

Finally, the Association requests the PERB address the District's delay in providing job descriptions to both the PERB and the Association in this matter. It asserts that the District's failure to provide the requested job descriptions until the last day of the hearing was negligent, if not constructively contemptuous. As a result, the CREA argues that it was deprived of the opportunity to develop its

arguments relating to the District's changes in the listing of "Instructional Aides" from Administration Exhibit 1 to Administration Exhibit 2.

District:

In opposing the Association's petition, the District argues that the more appropriate bargaining unit would not combine professional staff with Instructional Aides, but rather would create a separate unit comprised of all aides, both instructional and non-instructional. If the PERB determines, however, that Instructional Aides are appropriate for inclusion within the existing professional bargaining unit, the District contends that included positions should be limited to the following:

- Intensive Learning Ctr. Aide
- General Instructional Aide
- Visually Impaired Aide
- Special Ed. Instructional Aide
- Level 5 Classroom Aide
- Level 5 Classroom Aide/Lifeguard
- Limited English Proficiency Aide
- Computer Lab Attendant

The District asserts that instructional aides are prohibited from joining teachers in a bargaining unit because teachers are supervisors of their instructional aides. Teachers are charged with the responsibility and obligation to control the classroom, insure the progress and effective implementation of their programs, assess student interventions, and make necessary changes. It notes that the Department of Public Instruction Manual provides in its requirements for Classroom Aides permits that such aides function "... under the supervision of a teacher". Further, the Performance Responsibilities of teachers, as set forth in the District's Teacher Job Description include, "To plan, and supervise purposeful assignments for support staff and volunteers and assist in evaluating their job performance." While the PERB held in Kent Vo-Tech (Supra.) that the hiring, direction, utilization and evaluation of aides in the Kent Vo-Tech School District were processes exclusively conducted by administrators, the Caesar Rodney District argues that the evidence

presented in this case shows that teachers "formally evaluate" their aides and that teacher complaints and concerns relative to aide's performance are effective in influencing personnel decisions.

The District maintains that the skills, duties and job responsibilities of instructional aides are substantially different from those of its certified professional employees and these differences are sufficient to statutorily preclude the amendment of the existing bargaining unit of professionals to include Instructional Aides. Teachers and aides differ in the requisite qualifications for each position relative to education and training. Teachers have significantly higher levels of duties and responsibilities with respect to accountability, creating, planning, providing and evaluating the instruction of students, while aides perform routine tasks, as directed by the supervising teacher. Teachers are expected and required to exercise independent judgment and discretion. While the primary responsibility, by law, policy and custom, of a teacher is the instruction of students, the principal job of aides to "... assist classroom teachers in activities which support the teaching process". While admitting that teachers and instructional aides have substantially the same working conditions, the District reasons that everyone working in the school district has essentially those same working conditions. Finally, the District concludes that Caesar Rodney is not like Kent Vo-Tech, but rather is more similar to the Lake Forest School District where the PERB has previously held that aides do not have sufficient commonality of interest with teachers to be included as part of the professional bargaining unit. Rather, it argues, a greater commonality exists between all aides, both instructional and non-instructional, in that they all primarily support and assist professionals. It asserts that including the instructional aides in a bargaining unit, to the exclusion of non-instructional aides would fragment the unified group of aides and would not advance the efficient administration of the District.

The District disputes the Association's assertion that it should be sanctioned for failing to provide job descriptions for the affected employees in a timely manner. It argues that, while the job descriptions were not finalized at the time that they were initially requested by the PERB on April 2, 1992, they were ready and available for presentation on the first day the hearing in this matter, but were not presented because the hearing concluded prior to the presentation of the District's case in main. Further it notes that the Association did not object to the admission of the non-instructional aide job descriptions into evidence, but objected only to the authenticity and accuracy/completeness of the instructional aides job descriptions. The District maintains the Association has failed to show any prejudice which resulted from not having the job descriptions prior to the final day of hearing.

#### OPINION

The purpose of the Public School Employment Relations Act is to promote harmonious and cooperative relationships between public school employers and their employees and to protect the public interest by assuring the uninterrupted and orderly operation and functions of the public schools. It is the declared policy of the State of Delaware that these goals are best effectuated by granting to public school employees the right to be organized and represented. 14 DeL.C. §4001. Public school employees are defined as any employee of a public school employer except public school administrators and confidential employees. 14 DeL.C. §4002(q), emphasis added. Further, as the PERB held in the Kent Vo-Tech decision (Supra, at p. 743), the Delaware Legislature did not create a presumption that professional and non-professional employees are inappropriate for inclusion in the same bargaining unit. Considered as a whole, the Act broadly confers the rights and obligations of collective bargaining on public school employees, with very few exceptions.

In considering petitions for appropriate bargaining unit determinations, §4010(d) requires the PERB to 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 relative appropriateness of the existing unit is not a determining factor in considering a petition to modify that unit. Lake Forest (Supra., at p. 655). The unit designated by the PERB need not be the only appropriate unit. The Board has an obligation to rule on the appropriateness of the unit petitioned for by the employees.

The PSERA requires that supervisory and nonsupervisory employees be placed into separate appropriate bargaining units. 14 DeL.C. §4010(d). A "supervisory employee" is defined as:

... any employee of a public school employer who has the 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 to 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. (*emphasis added*)

The statutory definition of a supervisory employee, while stated in the disjunctive, requires that a supervisor first have "authority" to act "... in the interest of the public employer...". It is this delegation of essential authority which is the foundation of supervisory status. In order to qualify as a bona fide supervisor under the statutory definition, one must possess consequential responsibility and exercise consequential authority over subordinate employees.

The District argues that teachers qualify as supervisors because they "responsibly direct" their aides and "effectively recommend" actions to administrators which affect their instructional aides. The District has failed,

however, to establish that teachers possess the requisite authority to act in the interest of the employer. Examination of the testimony and documentary evidence presented in this matter reveals that while teachers are responsible for the coordination of effort and the creation of a supportive, learning environment, there is no credible evidence that they have the authority to enforce their direction of the aides. Rather teachers are required to advise administrators of their suggestions and requests for intervention and/or discipline should a problem arise. Ultimately, the building administrator exercises his or her independent judgment and authority in determining what, if any, action is to be taken. Further, although the District argues that teachers "formally evaluate" instructional aides, the evidence presented does not support this assertion. The testimony of the teachers and administrators alike confirms that any input teachers provide is informal, at best. The three principals who testified all described a process wherein they received any input from the teachers through "conversations". They all agreed that it was the building principal who is responsible for evaluating the aides, although this responsibility is often delegated to assistant principals. The testimony of the teachers confirmed that any performance input they may supply is not done through a formal process. While it should be noted that each aides job description lists "the supervising teacher" as one of the evaluating parties, the testimony and evidence does not support the assertion that teachers are responsible for effectively evaluating their aides nor is there any evidence that they have the authority to set performance standards for the instructional aides. Finally, although the District argues that teachers are responsible for the performance of the aides and their direction and training, responsibility without authority does not meet the statutory criteria for supervisory status. Teachers in the Caesar Rodney School District supervise the instructional process rather than the instructional aides. Supervisory status sufficient to preclude

inclusion in a bargaining unit requires the supervision of people, not processes or things.

Having determined that the instructional aides are not excluded from the professional bargaining unit on the basis of either their nonprofessional status or a supervisory/subordinate relationship to teachers, the merits of this case must be considered based upon the factors enumerated in §4010(d) of the Act.

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

It is not disputed that teachers are charged with the primary responsibility for the education of their students, and that aides are not teachers. The statute does not require that all employees in a bargaining unit perform identical functions. Rather, all bargaining unit employees must share a community of interest which is premised upon the similarity of their duties, skills and working conditions. Kent Vo-Tech (Supra., p. 744). The direct evidence and testimony in this case establish that teachers and instructional aides are primarily involved as an integral team in delivering instruction to students. Teachers and instructional aides share the same work space, student contact hours and academic year. They attend in-service training and staff meetings together. They monitor and document student progress as a team. They enforce codes of conduct and discipline non-compliance. While the teachers are charged with responsibility for directing the learning process, it is clear that instructional aides play an important part in facilitating this process. The District's argument that the differences in educational qualifications and responsibilities are significant and outweigh the fact that teachers and instructional aides share the same working conditions is rejected in light of the evidence that these employees are integrally involved in providing instruction directly to students.

The District also argues that even if there is a community of interest between teachers and instructional aides, there is a stronger similarity in the work of instructional and non-instructional aides. While this position may or may not be

valid, the PERB is charged with considering the petition as presented. It is the burden of the parties to show cause why the petitioned for unit is or is not appropriate based upon the criteria provided at §4010.

B. History and Extent of Organization

Instructional aides have never been organized nor represented. The bargaining unit comprised of professional staff has a long-standing and productive relationship with the District. The collective bargaining agreement existing at the time this petition was filed covered the period of July 1, 1990 through June 30, 1992. A successor two year agreement was recently negotiated by the parties. While the modification of the professional bargaining unit may impact some of the terms of this agreement, there is no evidence that the resultant bargaining relationship would be more or less difficult than if instructional aides were placed in a separate bargaining unit. Accordingly, this consideration does not resolve the issue raised by this petition.

C. Recommendations of the Parties

The parties to this matter are not in agreement as to disposition of this petition. The District suggests that the more appropriate unit for instructional aides would be a bargaining unit comprised of all aides, both instructional and non-instructional. There is, however, no indication that non-instructional aides have a desire to be so represented, nor has the Association requested such a unit. The District does not have standing under §4010(a) of the Act to propose a bargaining unit which the affected employees have not requested and this Board is constrained to consider the appropriateness of the requested bargaining unit. For this reason, the recommendations of the parties are of no dispositive in resolving this matter.

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

The efficient administration of government requires the fewest number of bargaining units consistent with the rights of the employees to organize and choose

an exclusive bargaining representatives. Kent Vo-Tech (Supra.). Consideration of the impact of over-fragmentation requires balancing the interests of the employer in maintaining the fewest possible units in order to ensure a degree of uniformity in benefits and working conditions while avoiding a patchwork of bargaining units, with the interests of the employees in effective representation.

There are currently two bargaining units in the Caesar Rodney School District: the first representing its professional employees and the second representing custodial employees. Overfragmentation is not, therefore, an overriding consideration in resolving this matter.

E. Such Other Factors as the Board Deems Appropriate

Two prior PERB decisions involve the inclusion of instructional aides in existing professional employee bargaining units. In Lake Forest (Supra.), the Board considered a request to combine an existing unit of professional employees with an existing unit of classified employees (consisting of secretaries, clerks, custodians and aides). In Kent Vo-Tech (Supra.), the employees requested that the existing unit of professional employees be amended to include an unrepresented group of instructional aides. Each of these cases differs in a number of respects from the instant petition.

In Lake Forest (Supra.), the petition sought the consolidation of both the professional and classified bargaining units, in their entirety. The Board held that the interests of secretarial and custodial employees were incompatible with professional employees who are involved primarily in student instruction. Consequently, the petition was rejected. Kent Vo-Tech (Supra., at page 747). In reaching this result, the Executive Director reasoned:

Many factors impact the determination of an appropriate bargaining unit and none alone is determinative. Of particular importance when grouping employees together into an appropriate bargaining unit is that they share similar responsibilities, duties and skills. These factors are entitled to even greater weight when the issue involves the

intermingling of professional and non-professional employees into one bargaining unit. (Lake Forest (Supra., at p. 665).

In Kent Vo-Tech (Supra.) the PERB determined that unrepresented Instructional Assistants were appropriate for inclusion in the professional bargaining unit because the similarities in the day-to-day working conditions of the employees were compelling. In reaching this conclusion, the Board observed:

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.... Testimony established that while it is the teacher 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. Kent Vo-Tech (Supra., p. 744).

The Kent County Vo-Tech School District provides the secondary Intensive Learning Center education for the eligible students of Kent County who are served in the elementary and middle school ILC programs of the Caesar Rodney School District. The teachers and instructional aides in the Caesar Rodney programs function as a team, similarly to those in the Kent Vo-Tech ILC. The instant case bears greater similarity to the situation in Kent Vo-Tech (Supra.) and the logic of that decision is compelling.

The only remaining issue involves a determination of the scope of the term "instructional aide". The District's original list of instructional aides (Administration Exhibit 1), submitted on March 30, 1992, was amended during the first day of hearing by Administration Exhibit 2. The differences between these two lists were documented through the introduction of Job Descriptions, the testimony of the District's witnesses and a post-hearing submitted by the District's counsel. The Association listed the positions it was requesting for inclusion in its Opening Brief of September 25, 1992. The Association requested that its listing be considered as the conclusive listing of instructional aides because the District had failed to provide Job

Descriptions to either the Association or the PERB prior to the final day of hearing. In reviewing the record, it is evident that most of the relevant job descriptions were generated and/or finalized during the course of this litigation. The District's failure to respond to the PERB's April 2nd request for copies of job descriptions and Dr. Bach's responses to the Association's Counsel's questions regarding their availability during his testimony on June 19 are viewed as less than forthright. The PERB acknowledges that it could have been more aggressive in pursuing the issue prior to the hearing. It also notes that subsequent to the first day of hearing the Association could have requested that the job descriptions be subpoenaed from the District prior to the continuation of the hearing two months later. Further, the Association has not shown that real and adverse prejudice resulted from the late introduction of the job descriptions. Consequently, the District's action is not cause for the imposition of sanctions. The Board does, however, acknowledge the validity of the Association's concern.

As a result of the parties' inability to agree as to what constitutes an instructional aide, the PERB accepts responsibility for defining the scope of the term. For the purpose of amending the bargaining unit definition, an instructional aide includes those aides whose primary responsibilities include the performance of curriculum oriented instructional assistance directly to students. Based upon the evidence and documentation presented, this definition includes following positions:

- Intensive Learning Ctr. Aide
- General Instructional Aide
- Visually Impaired Aide
- Special Ed. Instructional Aide
- Level 5 Classroom Aide
- Level 5 Classroom Aide/Lifeguard
- Limited English Proficiency Aide
- Computer Lab Attendant
- Interpreter Aide

Each of these positions shares the goal of assisting and supporting in the instruction of students and requires the direct interaction with students in the instructional

setting. While these positions may also provide some clerical or administrative support to the professional teaching staff, it is clear that a majority of their time spent interacting with students as a integral part of an instructional team.

DECISION

For the reasons set forth above, it is determined that the petitioned for bargaining unit including all certified professional employees, except administrators and instructional aides of the Caesar Rodney School District 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 sixty days in order to determine whether the instructional aides desire to be represented for the purpose of collective bargaining by the Caesar Rodney Education Association.

IT IS SO ORDERED.

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DATED: December 8, 1992