

14 Del.C. §4002(h).² AEA, an affiliated local of the Delaware State Education Association, NEA, is the certified exclusive bargaining representative (within the meaning of 14 Del.C. §4002(i)³) of the bargaining unit certified, non-administrative employees of the District.

On May 15, 2013, AEA filed a Petition for Clarification of Existing Certified Bargaining Unit, seeking to clarify whether Jr. ROTC Instructors are included in the existing bargaining unit.

By letter dated May 24, 2013, the District objected to the petition asserting 1) Jr. ROTC Instructors are not covered by Title 14, Education, because they are no longer certificated by the Delaware Department of Education (DOE); and 2) there is no community of interest between the military instructors and other bargaining unit employees.

A public hearing was held on July 2, 2013 at which time the parties were afforded a full opportunity to present evidence in support of their respective positions. Written closing arguments were received from both parties. This decision results from the record thus created by the parties.

FACTS

The facts set forth below are derived from the record created by the parties.

The District established a Junior Reserve Officer Training Corp (JROTC) program at Middletown High School (MHS) in approximately 1980. The MHS program is and has been conducted since 1980 in cooperation with the US Air Force (USAF), under the directives of the

² “Employee organization” means any organization which admits to membership employees of a public school employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

³ “Exclusive bargaining representative” or “exclusive representative” means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent of all employees in that bargaining unit.

Secretary of Defense. The directives require that JROTC instructors be retired from the USAF and sets forth the educational requirements for certification by the Air Force. The District and the USAF entered into an Agreement for the Establishment of an Air Force Junior Reserve Officer Training Corps Unit, the most recent of which was entered into the record in this matter. *Association Exhibit 10*. That agreement states, in relevant part:

SECTION 2. INSTITUTION AGREEMENT

2. Contingent upon the acceptance of this application and upon fulfillment of the conditions presented in Section 1, the governing authorities of the institution agree as follows:

A. Proper Accreditation for Course of Study

i. To establish Aerospace Science as a separate, integral academic and administrative department of the institution and to establish a minimum 3-year course of AFJROTC consisting of at least 120 classroom hours per year...

iv. To grant academic credit applicable toward graduation requirements for successful completion of AFJROTC courses provided by the Air Force, equivalent to credit given for other academic courses...

D. Faculty Staff Support for AFJROTC Unit

i. To employ, as a minimum, one retired Air Force commissioned officer and one NCO whose qualifications are certified/licensed by the Air Force (in accordance with the provisions of paragraph 1b (iii) above) to conduct Aerospace Science/Leadership Education courses and other AFJROTC activities...

ii. To advise AFJROTC of any changes in the employment status of personnel employed in the AFJROTC unit.

iii. To conduct annual instructor evaluations ... and submit through Air Force channels.

iv. To provide subject retired commissioned officers and NCOs a written contract of employment with the institution's district as the employing agency. Such contract of employment shall contain, at a minimum, the following provisions:

- To ensure Air Force retired personnel employed receive at least "Minimum Instructor Pay (MIP)". "MIP" is defined as an amount equal to the difference between their entitled retired pay and the active duty pay and allowances, excluding hazardous duty and proficiency pay, which they would receive if performing Air Force active duty...
- To stipulate the duration of employment and amount of salary, provide for an automatic adjustment of MIP when active duty pay increases, and

specify the duties of the AFJROTC instructor as a cooperative employee of the institution's district...

- To ensure AFJROTC instructors perform only those duties connected with the instruction, operation, and administration of the AFJROTC program. Individuals employed as AFJROTC instructors will not perform duties or teach any classes other than Aerospace Science. Exceptions are permitted if the performance of such duties or the teaching of such classes are conducted outside the institution's normal day of academic instruction and are contracted between the institution and the individual AFJROTC instructor at no expense to the Air Force. This provision does not preclude AFJROTC instructors from serving on committees or performing other routine duties that are rotated regularly among institution faculty members.
- To ensure AFJROTC instructor and such other personnel that are hired to support the AFJROTC program at the institution are employees of the School District and in no event shall the School District represent such instructors and personnel as Air Force employees, agents, or contractors. The School District shall include the Senior Aerospace Science Instructor in meetings where policies, recommendations, or decisions affecting the AFJROTC program are made, including the employment or discharge of Aerospace Science Instructors.

In 1996, Major Daniel Alvarez was hired into the Senior Military Instructor position in the MHS JROTC program. At that time, he was required by the State of Delaware to obtain certification and licensing from the Delaware Department of Education (DOE), in addition to meeting the Air Force requirements for maintaining his military certification. Chief Michael Conaway has served as the Non-Senior Military Instructor at MHS since at least 1998; he was also required to obtain State certification and licensure, in addition to maintaining his military certification.

It is undisputed that both Major Alvarez and Chief Conaway were in bargaining unit positions since they were hired and were considered certified classroom teachers at that time. The District provided unrefuted testimony that they have been paid according to the salary matrix included in the parties' collective bargaining agreements.

Article II, Recognition, of the ASD and AEA collective bargaining agreement for

September 4, 1984 through June 30, 1987, states:

- A. The Board hereby recognizes the Association as the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all regularly employed personnel under contract: classroom teachers, guidance counselors, school nurses, librarians, visiting teachers, psychologists, extra-duty personnel who are otherwise defined as members of the bargaining unit, subject coordinators who do not fill administrative positions, but excluding cafeteria employees, custodians, clerical staff and teacher aides. *Association Exhibit 1.*

This Recognition clause remained unchanged through the 1987-1996 collective bargaining agreements. *Association Exhibits 2, 3, 4.*

In or about 2000, after an extended period of negotiations, the Association and the District entered into a successor to their 1993-1996 agreement which included at Article 1, a modified recognition clause:

The Board recognizes the Association as the exclusive negotiating representative of the certified non-administrative employees, not including substitutes, supervisory, or staff personnel of the District, in all matters specified in Chapter 40, Title 14, Delaware Code, unless another provision of the Delaware Code supersedes this section. *Joint Exhibit 1.*⁴

In or around 2010, the District added a second high school and initiated a second JROTC program, this one affiliated with the US Army. Similar to the USAF JROTC program at MHS, the Army program at Appoquinimink High School (AHS) is also governed by a cooperative agreement between the District and the Army pursuant to Cadet Command Regulation 145-2. *District Exhibit 2.* The Army requires JROTC Instructors to be retired from the Army and to attain and maintain Army certification to be eligible for hire by the District as JROTC Instructors. Cadet Command Regulation 145-2 states:

4-34. Instructor's Pay

- a. Pay is authorized for retired instructors employed by the school, whose

⁴ This Hearing Officer takes administrative notice that each of the four collective bargaining agreements entered into by these parties which collectively cover the period of July 1, 2000 through August 31, 2013, include this Recognition clause, without modification.

qualifications are approved by the CG, USACC, in the amount that, when added to their retired pay will equal the amount of their active duty pay and allowances exclusive of hazardous duty pay. DOD Instructions 1205.12 and Enclosure 1 of 32 Code of Federal Regulations (CFR) Part 111.7 show examples of how calculations for JROTC instructor's compensation pay is calculated. Active duty pay and allowances to be used in computing the pay of JROTC instructors include:

- 1) Basic pay (longevity increases).
 - 2) Basic Allowance for Housing (BAH) (includes Alaska and Hawaii) and any housing allowance authorized for post of assignment of Volume 1, JFTR (unless Government quarters are occupied).
 - 3) Cost of living allowance authorized for post of assignment in Volume 1, JFTR.
 - 4) Clothing maintenance for enlisted personnel.
 - 5) Basic allowance for subsistence.
- b. Minimum Instructor Pay (MIP) is the difference between official retired pay, reported by DFAS, and the active duty pay and allowances (excluding hazardous duty and special pays). Active duty Pay and Allowances are based on the DFAS current year Military Pay Tables.
- 1) Basic pay (calculated on rank and years of service).
 - 2) Basic allowance for housing (based on zip code of employing school).
 - 3) Cost of living allowance (if applicable).
 - 4) Overseas housing allowance (if applicable).
 - 5) Clothing allowance for uniforms (enlisted only).
 - 6) Basic allowance for subsistence.
 - 7) Schools employing JROTC instructors **must pay** the minimum instructor salary.
- c. JROTC instructors are entitled to pay from the school or educational department for a minimum contract period of 10 and up to 12 months as negotiated by the JROTC instructor and school officials. (Schools may negotiate contracts of less than 12 months; however, they will ensure year round management of the program and control of military property.) Headquarters, Department of the Army, ensures adequate and timely availability of funds to meet Army contractual requirements for instructor salaries. Reimbursement will be made for not more than 30 days of leave per year, if included in the contract. **The Army will not reimburse the school for any portion of extracurricular services not related to JROTC.**
- d. The Army will determine the minimum instructor pay (MIP) for

each hired instructor, however, schools may pay instructors more than the amount in paragraph *a* above and will, as a minimum, offer instructors the same benefits package received by teachers in a comparable status. The amount paid to the school by the Army is limited to that prescribed in paragraph 4-38 below. USACC will furnish those figures to schools upon request. USACC obtains information pertaining to retired pay from the DFAS center. Stipends are paid to the instructor at the school district's discretion. If the stipend is paid for JROTC related activities and duties, this amount will not be calculated as part of the MIP. **The stipend is the amount above the MIP.**

- e. For each retired instructor reimbursable by the Secretary of the Army and employed by the school 12 months each year, DA will pay to the school an amount equal to one-half the difference between the instructor's retired pay and the amount of pay and allowances (excluding hazardous duty, flight and other specialty pay) the instructor would receive if ordered to active duty. For periods of service as a JROTC instructor of less than 12 months, the instructor will be compensated the difference between the amount of the retired pay and active duty pay for the length of employment as a JROTC instructor. This should be expressed as a fraction of 12 months. In districts that compensate instructors for less than 12 months or any period greater than the contract, the instructor's salary will be cost-shared based on the number of contract months rather than the number of pay periods. All of the retired pay must be considered even though the member may have waived all or a portion of it to receive Veteran's Administration disability compensation.
- f. Schools will provide an employment contract (approved by the Army) for a JROTC instructor for that part of the summer (or interim) months, between academic sessions, during which the instructor performs administrative or instructional duties that are directly related to the JROTC Program. Administrative and instructional duties directly related to the JROTC Program that would entitle a JROTC instructor to compensation include, but are not limited to:
 - 1) Administrative and instructional duties performed in an interim term JROTC program, such as summer school and camps.
 - 2) The preparation of new course materials during the period immediately before the beginning of a school year.
 - 3) The collection of uniforms, books and supplies at the end of a school year.

During the summer of 2010, the District hired both Chief Hiram Benitez and Master Sgt. Carl Sudler to the positions of Senior Military Instructor and Military Instructor, respectively.

Both Benitez and Sudler had previously worked in the JROTC program at Mount Pleasant High School in the Brandywine School District. Neither Benitez nor Sudler had been members of the faculty union when they were employed at Mount Pleasant High School and neither held a state DOE teaching certification. The letter to the US Army Command requesting to hire Chief Benitez noted he would be paid at the “minimum instructor pay (MIP)”. *District Exhibit 1.*

It is undisputed that both the USAF JROTC Instructors at MHS and the Army JROTC Instructors at AHS perform essentially the same functions. They are responsible for teaching military science courses which high school students may elect to take. They are responsible for the operation of the JROTC program in their schools, including drilling instruction and preparing their corps for various co-curricular activities both on and off campus. They evaluate and grade the students enrolled in their courses, for which the students receive academic credits. They are required to attend faculty and departmental meetings and to participate in the responsibilities at their schools like other faculty members, including such things as hall and bus duty and committee work. The JROTC Instructors are evaluated by their building administrators using the state DPAS II evaluation system. They are required to be familiar with and to adhere to all District and building policies and are subject to discipline by school administration for failure to follow those policies. They are also required to meet the standards of their affiliated military branch in order to maintain their certification and are required to complete professional development work mandated by the military. The JROTC Instructors received the same benefits as all other faculty members in the District.

ISSUE

DOES THE BARGAINING UNIT OF “CERTIFICATED NON-ADMINISTRATIVE EMPLOYEES” CURRENTLY REPRESENTED BY THE APPOQUINIMINK

EDUCATION ASSOCIATION, DSEA, NEA, INCLUDE THE **JUNIOR ROTC INSTRUCTOR** POSITION?

POSITIONS OF THE PARTIES

Appoquinimink Education Association:

The Association argues the JROTC Instructor position is essentially the same as any other classroom teacher position, all of which have been historically included in the bargaining unit. JROTC Instructors share the same duties and responsibilities as classroom teachers; are subject to the same evaluation process by building administrators under DPAS II; are assigned extra duty responsibilities (e.g., bus and hall duty) as part of the faculty; are required to attend faculty meetings; and are required to comply with all District policies and procedures. JROTC Instructors are subject to discipline, up to and including termination, by the District for violating its policies, procedures or work standards.

The District's argument that JROTC Instructors are not certified by the Delaware Department of Education and are therefore not part of the bargaining unit is flawed. JROTC Instructors are certified by the U.S. Department of Defense and are required to maintain current certification. This requirement to maintain certification by an organization other than DOE to be eligible for continued employment is similar to the requirements that Occupational and Speech Therapists employed by the District must meet. The District does not dispute that these therapists are included in the bargaining unit.

The fact that JROTC Instructors must be paid at least the Minimum Instructor Pay per the District's agreement with the U.S. Dept. of Defense and that the Instructors are subject to military standards above and beyond those imposed by the District does not mean these positions are ineligible for representation under the PSERA. Many of the provisions of the current

collective bargaining agreement protect the rights of ROTC Instructors as employees of the Appoquinimink School District.

For all these reasons, the Association asserts the JROTC Instructors fall within the existing bargaining unit definition.

Appoquinimink School District:

The District argues the Association is asking PERB to interpret the meaning of the Recognition Clause of the parties' collective bargaining agreement. It asserts PERB lacks authority to "interpret, decide intent, or to enforce negotiated and ratified provisions of the collective bargaining agreement. Consequently, PERB cannot make a determination as to the impact of the change in the wording of this clause from "classroom teachers" to "certificated non-administrative employees."

The District also argues the JROTC Instructor position is distinctly different from any other bargaining unit position because incumbents are not required to be certified or licensed to teach in Delaware by the Professional Standards Board. None of the current JROTC Instructors are certificated as required by the parties' current Recognition Clause. It asserts the JROTC Instructors are covered by federal regulations that mandate the minimum qualifications for hire, minimum pay requirements, and working conditions and due process protections to be afforded these employees. Because no other bargaining unit position is covered by these mandates, the JROTC Instructor positions must be excluded from the bargaining unit as distinct.

OPINION

PERB's express authority to determine appropriate bargaining units carries with it the

implied authority to police certifications and to clarify them as a means to effectuate the policies of the PSERA. A Unit Clarification petition does not raise a question of appropriateness, nor does it raise a question concerning representation.⁵ It also does not seek a pure application or interpretation of the parties' collective bargaining agreement. Historically, many faculty and professional bargaining units in Delaware public school districts were created or recognized prior to 1982, the effective date of the PSERA. Those units were "grandfathered" under the PSERA and were specifically exempted from any requirement to be recertified. Consequently, there are no bargaining unit records in PERB's files, or, in many cases, in the Department of Labor records which were forwarded to PERB. The history of organization, including the evolution of the contractual recognition clause, must be considered in order to understand the unit composition and to evaluate a bargaining unit clarification petition.

This petition also does not raise a question of eligibility. The PSERA covers "any employee of a public school employer except public school administrators and confidential employees of the public school employer..." 14 Del.C. §4002(p). It is undisputed that JROTC Instructors are public school employees and it has not been alleged or proven that they are either administrators or confidential employees of the District.

The petition seeks clarification as to whether positions or classifications fall within or outside of an existing unit definition. A Unit Clarification does not amend or modify the existing bargaining unit definition; it simply clarifies its application to a position or classification in question. *COAD & State DOC*, Rep. Pet. 08-01-613, VI PERB 4003, 4040 (2008).

Changes in the organization and/or structure of the workplace and distribution of work are inevitable over time. Those changes do not, however, alter the bargaining unit certification

⁵ The issue presented seeks clarification as to whether this position is within the existing bargaining unit definition. *In RE: Capital School District Benefits Specialist*, Rep. Pet., 94-09-103, II PERB 1175, 1178 (1995).

or definition. In most cases, employers and bargaining representatives are able to resolve resulting scope of bargaining unit issues through discussion and mutual agreement. In the few instances where there is genuine disagreement, a Unit Clarification petition may be filed by either the employer or the exclusive bargaining representative, seeking PERB resolution. *AFSCME Local 879 v. State of Delaware, Department of Transportation*, Rep. Pet. No. 07-12-609, VI PERB 4053 (2008).

The petition in this case results from a question concerning the bargaining unit status of two groups of JROTC instructors. One group is affiliated with the U.S. Air Force and teach at Middletown High School and the second group is affiliated with the U.S. Army and teach in the much newer program at Appoquinimink High School.

The District argues that the change in the Recognition clause of the parties' collective bargaining agreement in 2000 represents a substantive change under which only professional employees who are certified by the State's DOE Professional Standards Board can be included in the bargaining unit. The District's witness, Donna Mitchell (who was on the District's negotiating team during the 1997-2000 period and was the Director of the State DOE Professional Standards Board at the time of this hearing), testified that prior to 2003 JROTC Instructors were required to meet the state DOE requirements for teaching certification (including passing the PRAXIS exam) and were licensed for "specialized assignments". This is consistent with the testimony of Major Alvarez that he was given a two year period after his hire (in 1996) to pass the requirements for state certification. Ms. Mitchell also testified that in 2003, the state ceased requiring DOE certification and licensure, "... but, rather [JROTC Instructors] ... need a letter or certificate from the military showing that they are certified prior to hiring."

The District's argument concerning the impact of the negotiated Recognition clause

breaks down when it argues that the modification in 2000 (at which time JROTC Instructors were still required to hold State certifications) was somehow prescient, such that the later changes in the State certification requirements in 2003 would deprive the JROTC Instructors of their bargaining unit status and/or right to representation under the PSERA.

A clarification petition also does not raise a question of appropriateness. Whether the JROTC Instructors share a community of interest (a classic appropriateness argument) with other bargaining unit positions is irrelevant. Although the agreement between the District and the military sets a minimum salary level at the MIP, the collective bargaining agreements negotiated by the District and Association over the last thirty-three years evidence their ability to negotiate differentiated rates of pay. This is evident both in the salary matrix for this bargaining unit (wherein salary levels are differentiated by level of education and years of experience) and in the Extra Pay for Extra Responsibilities (EPER) schedules.⁶

The District's position that JROTC Instructors cannot be included in the bargaining unit because their salaries are dictated by the military branch with which they are affiliated is not supported by the record. In fact, the "Agreement for Establishment of an Air Force Junior Reserve Officer Training Corps Unit" at MHS (as executed in the Spring of 2012) specifically states, "...Although the institution is only required to pay MIP, it is highly encouraged to pay instructors above MIP commensurate with their military experience, education level, area cost of living, etc., in order to attract and retain the best candidates." *Association Exhibit 10*. Similarly, the Army Cadet Command Regulation 145.2 states, "... schools may pay instructors more than the amount in paragraph *a* above [the MIP] and will, as a minimum, offer instructors the same benefits package received by teachers in a comparable status." *District Exhibit 2, p. 52*. There is

⁶ The EPER schedules are differentiated by whether the responsibilities are athletic or academic in nature and then the "extra duty" jobs are categorized into sub-groups for which specific and differentiated stipends are attached.

nothing in the record which limits or impinges upon the JROTC Instructors right to choose to be represented in collective bargaining or to have the union represent them in negotiating their wages above and beyond the MIP.

The District's agreement with the military branches to provide the JROTC program at its two high schools is conditioned on the instructors being compensated at the MIP rate, of which the military branch pays half of that cost. The military makes it explicit that the District is not prohibited from paying more than the MIP, and in fact is encouraged to do so in order to attract and retain the best candidates. The agreement further limits the District's use of the JROTC Instructors to only JROTC related activities during the normal academic day, but allows the District to use and compensate the Instructors for additional, unrelated activities outside of the school day. One might imagine this could be having a JROTC Instructor coach or perform another EPER function for which he or she would be compensated according to the EPER schedule in the collective bargaining agreement.

The agreement between the District and the Air Force also specifically states that the AFROTC Instructors are employees of the District and should not be represented as USAF employees, agents or contractors (§D, p. 6); the school's principal is the on-site person in charge of supervision of the AFJROTC program (§C.A, ii, pg. 8); that AFJROTC Instructors are to be afforded the same professional development privileges and support as other faculty members (§C.A, iv, pg. 8); and that "the institution has the right to terminate the employment of AFJROTC Instructors in accordance with institutional rules and regulations (§3.C, p. 9). *Association Exhibit 10.*

There is a clear differentiation between termination of a JROTC Instructor by the District, as opposed to revocation of the Instructor's certification by the affiliated military branch. Army

Cadet Command Regulation 145-2 states, “Any instructor who voluntarily resigns, or has their employment terminated by the high school while under investigation for adverse action will have their certification to teach JROTC suspended until the case/charges have been adjudicated.” *District Exhibit 2, p. 40.* The USAF agreement states, “...The institution has the right to terminate employment of certified AFJROTC instructors in accordance with institutional rules and regulations.” The Air Force, however, has the “...right to withdraw certification of AFJROTC instructors for breach of standards and the institution will remove decertified personnel from the AFJROTC program.” *Association Exhibit 10, p. 9.* The negotiated just cause provisions would apply to the District’s termination of an employee even where the instructor is decertified by the military, because that instructor would no longer meet a condition of employment (certification) over which the District exercises no control. This is similar to state required certification for any other faculty member; if they lose DOE certification, the District has no authority to consider whether the revocation by the DOE was justified or not.

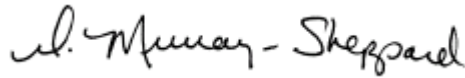
The record establishes that the Army JROTC Instructors at AHS were paid in a different manner when the program was set up at the new high school in 2010 (i.e., they were paid the MIP), whereas the JROTC Instructors at the more established USAF program at MHS had been paid according to the negotiated salary scale in the parties’ collective bargaining agreement. There is nothing in this record which differentiate the positions between the two schools, except that the District made a decision to compensate them differently. This decision does not have any impact on the bargaining unit status of the positions, although it may lead to problems for either under the application of the cooperative agreements with the military (if the Instructors are not receiving compensation at least equal to the MIP) or under the collective bargaining agreement (if they are not being compensated according to the terms of the negotiated

agreement). It is certainly reasonable to anticipate that these parties might enter into negotiations following the issuance of this decision for the purpose of negotiating the extent to which JROTC Instructors are covered by the terms of the collective bargaining agreement.

DECISION

For the reasons set forth herein, it is determined that the Junior ROTC Instructor positions are included within the bargaining unit represented by Appoquinimink Education Association, DSEA/NEA.

IT IS SO ORDERED.



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB

DATED: NOVEMBER 25, 2013