

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE:

ODYSSEY CHARTER SCHOOL EDUCATION	)	
ASSOCIATION, DSEA/NEA,	)	
	)	
Petitioner,	)	<b><u>Rep. Pet. No. 18-08-1156</u></b>
	)	
v.	)	Bargaining Unit Determination
	)	
ODYSSEY CHARTER SCHOOL,	)	
	)	
Respondent.	)	

**Appearances**

*Patricia McGonigal, Esq, DSEA General Counsel, for Petitioner*  
*Allison L. Feldstein, Esq., Saul, Ewing, Arnstein & Lehr, for Respondent*

**BACKGROUND**

Odyssey Charter School (“the School”) is a public school employer within the meaning of §4002(q) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (“PSERA”). The Odyssey Charter School Education Association, DSEA/NEA, (“the Association”) is an employee organization within the meaning of 14 Del.C. §4002(i).

On August 21, 2018, the Association filed a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative, seeking to represent a bargaining unit of:

All Certificated and Non-Certificated Personnel including Teachers and Specialists (School Counselors, Nurses, School Psychologists) and support staff (including Paraprofessionals and Facilities personnel) employed by the Odyssey Charter School, exclusive of administrative

and supervisory personnel, secretaries, food service workers and substitutes.

The petition was accompanied by a showing of support from the School's employees which was determined by PERB to represent at least 30% of the positions in the proposed bargaining unit.

On or about August 30, 2018, the School filed a list of employees it believed to be included in the proposed bargaining unit and its response to the scope of the unit, in which it stated:

Odyssey has excluded from the list part-time, hourly, janitorial staff, who are technically part of the school's "facilities department" for internal record keeping purposes but do not share a community of interest with the professional unit proposed by [the Association]. Although Odyssey does not believe that [the Association] likely intended to include the janitorial staff in the proposed unit as "facilities personnel", Odyssey hereby objects to their inclusion.

... In this case, the janitorial staff and the professional/paraprofessional members of the proposed bargaining unit have disparate duties, skills and working conditions. All members of the proposed unit are professional, salaried (with benefits), skilled, employees, the majority of whom work directly with Odyssey's students and parents. Although the janitorial staff perform an important function for the school, these workers have nothing in common with their professional counterparts such that their inclusion in the unit would result in efficient and productive collective bargaining: janitorial employees are not highly skilled and have no professional training whereas the majority of employees in the proposed bargaining unit are college educated or otherwise certified in a skill or trade; different from janitors, the majority of the proposed unit employees work in the classrooms or in other school departments and spend the majority of their time interacting with students, parents, and other school administrative personnel; unlike salaried unit members, janitorial employees are paid hourly and are not eligible for the benefits available to the majority of the proposed unit members; and janitors are generally subject to different work rules, policies, and procedures than professional/paraprofessional employees. The disparate interests, employment terms, and working conditions between janitorial staff and other employees in the proposed unit are several and obvious on their face. Indeed the PERB has specifically held that intermingling of professional and non-professional employees into one bargaining unit is

not appropriate.<sup>1</sup> Accordingly, they should be excluded from the instant proposed unit.

Thereafter, on September 12, 2018, the Association responded to the School's objection to inclusion of part-time, hourly, janitorial staff from the proposed bargaining unit.

It included the following arguments in its response:

1. Similarity of duties, skills and working conditions – Four (4) “facilities personnel” are included on the Employee List and [the School] has not objected to their inclusion in the bargaining unit. *(footnotes omitted)* [The School], therefore, acknowledges that the Facilities Personnel share a community of interest with the other bargaining unit positions (teachers, specialists, and paraprofessionals). Attached... is the job description for Facilities Assistant II and ... the job description for Custodian. The “job summary” for both positions is nearly identical:

“Responsible for maintaining a clean and safe interior and exterior environment in various buildings and grounds on campus, perform **heavy** maintenance and assist staff with various requests to allow for smooth operation of educational services.”

Versus

“Responsible for maintaining a clean and safe interior and exterior environment in various buildings and grounds on campus, perform **light** maintenance and assist staff with various requests to allow for smooth operation of education services.”

Further, there are similarities in the general scope of principle duties for the positions, including: maintaining general cleanliness of the school interior, upkeep of the exterior grounds and providing assistance to other facilities personnel. Moreover, the two positions share most of the same basic qualification requirements, although facilities assistants must possess a trade skill (but a certification is not required) and similar physical requirements.

2. History and extent of the employee organization – Unlike in the *Lake Forest Education Association v. Bd. of Ed. of the Lake Forest School District* (1991) decision cited by [the School], we are not dealing with established bargaining units, each with a distinct bargaining history. There is no reason [the Association] cannot represent a combined unit of professional and classified employees, particularly where they work on one campus. [The Association] is new and the seminal negotiated collective bargaining agreement will

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<sup>1</sup> Citing *Lake Forest Education Association v. Bd. of Ed. of the Lake Forest School District*. Rep. Pet. 91-03-060, I PERB 651, 655 (Del.PERB, 1991).

address common working terms and conditions that apply to all employees. Such a bargaining unit is not unheard of in Delaware – the Smyrna Education Association is a “wall-to-wall” local representing both professional and classified employees. Further, to the extent there is a need to address specific working terms/conditions that apply to a subset of employees, this can easily be accommodated during bargaining and reflected in the negotiated agreement (as in the Smyrna CBA).

3. The effect of over-fragmentation of bargaining units on the efficient administration of government – The PERB has recognized that this factor requires “the designation of as few a number of appropriate bargaining units as possible balanced by the opportunity for the employees to exercise their rights under the [collective bargaining] statute. Here, having a separate bargaining unit comprised solely of the PT Janitorial Staff, which amounts to 5 individuals, is over-fragmentation and inefficient. Not only will the 5 employees be significantly disadvantaged if required to bargain on their own, the resources which would be spent by [the School] in conducting a full round of bargaining with such a small unit is highly inefficient.

In addition, the Association also took exception to fourteen (14) positions it asserts the School improperly omitted from the list of positions in the proposed bargaining unit, including three (3) Greek language teachers, a Speech Therapist, a high school Guidance Counselor, two (2) Specialists, four (4) Student Advisors, and the Managers of Student Services, IT, and Facilities. The Association asserts the Greek language employees are all teachers and/or specialists as contemplated by the proposed bargaining unit definition and the omitted Guidance Counselor performs the same functions as the two guidance counselors included on the Employee List. With respect to the other positions,

...[The Association] anticipates an argument from [the School] that these individuals are part of the school’s “leadership team”, as they are listed under the “Administration” section of the Staff Directory. This designation by [the School] is not dispositive of whether a position should be included in the bargaining unit.

At [the School], student advisors deal with student discipline and general building procedures. The individuals holding these positions are not in a supervisory role to other employees – they do not have the right to make personnel decisions, to hire or fire, or discipline employees, or to exercise independent judgment as to [School] personnel.

Further [the Association] understands that while some of these “leadership team” employees will be conducting DPAS observations of teachers, they have no supervisory role vis-à-vis other bargaining unit members and will not be involved in discipline and/or hiring/firing decisions. It is not uncommon for one bargaining unit member to conduct a DPAS observation of another bargaining unit member. Simply observing a lesson, recording your factual observations and forwarding those observations onto a person in a supervisory role, who will then exercise judgment and evaluate (i.e., assign a value to the reported observations) does not require exclusion from the unit.

[The Association] understands that the IT Manager position . . . does not supervise any staff – rather he is the sole IT person at the [School]. He is responsible for the school’s hardware and network. There is no reason for this position to be excluded from the bargaining unit.

Lastly, [the Association] asserts that the Facilities Manager position may be appropriate for inclusion in the bargaining unit. Presently [the Association] is without sufficient information to definitively state whether the Facilities Manager is a “supervisor” as defined in 14 Del.C. §4002(s), or whether the position is more akin to that of a foreman or custodian fireman, which is properly included in the bargaining unit.

[The Association] noted its understanding that the School’s Campus Operations Officer is the individual responsible for hiring, firing, disciplining and evaluating facilities personnel.

An expedited hearing was scheduled and convened by the Public Employment Relations Board on Wednesday, September 19, 2018.

At the commencement of the hearing, the parties stipulated they were able to agree to include the three Greek language teachers and the two Specialists in the bargaining unit. They also agreed the Speech Therapist position is in the bargaining unit, although the prior incumbent named by the Association was no longer employed at the School. The parties further agreed that the four Student Advisor positions and the three Manager positions named by the Association are not included in the unit. The agreement of the parties removes these positions from the scope of PERB’s determination at this time.

This expedited decision results from consideration of the documentary and testimonial evidence and argument presented at that hearing.

## ISSUE

- 1) **WHETHER PART-TIME, HOURLY JANITORIAL STAFF ARE APPROPRIATE FOR INCLUSION IN THE BARGAINING UNIT WHICH THE ODYSSEY CHARTER SCHOOL EDUCATION ASSOCIATION SEEKS TO REPRESENT; AND**
  
- 2) **WHETHER THE HIGH SCHOOL GUIDANCE COUNSELOR POSITION, IS ELIGIBLE AND APPROPRIATE FOR REPRESENTATION UNDER THE PUBLIC SCHOOL EMPLOYMENT RELATIONS ACT?**

## DISCUSSION

The agreement of the parties to include the three Greek language teachers, two Specialists, and Speech Therapist positions and to exclude four Student Advisors and three Managers from the bargaining unit do not constitute a determination by the PERB on the eligibility of these positions to be represented. The agreement of the parties is accepted on its face.

The Public Employment Relations Board is empowered to determine an appropriate bargaining unit of public employees for purposes of collective bargaining. *14 Del.C. §4002(a); §4010*. The determination of an appropriate bargaining unit results from a factual analysis of the specific facts and circumstances underlying and supporting a request to create or modify a bargaining unit, and there is no bright line standard that delineates appropriateness in every case. *AFSCME Council 81 and Delaware Turnpike Administration*, Rep. Pet. 95-06-140, II PERB 1189, 1193 (Del.PERB, 1995); *In RE: Rehoboth Police Dept. and IBT Local 326*, Rep. Pet. 96-10-198, III PERB 1531 (Del.PERB, 1997); *In RE: FOP Lodge 7 and University of Delaware Div. of Public Safety*, Rep. Pet. 00-10-292, III PERB 2137, 2140 (Del.PERB, 2001); *In Re: Sussex County and Communications Workers of*

*America*, Rep. Pet 07-02-557, VI PERB 3949, 3966 (Del.PERB, 2008).

The NLRB described the process for determining an appropriate unit in its 1991 decision on review in *Park Manor Care Center, Inc., and Local 1199, Drug, Hospital, and Health Care Employees Union 10*:

[I]n exercising its discretion to determine appropriate units, the Board must steer a careful course between two undesirable extremes: If the unit is too large, it may be difficult to organize, and, when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult for the union to represent; on the other hand, if the unit is too small, it may be costly for the employer to deal with because of repetitious bargaining ... jurisdictional disputes and wage whipsawing, and may even be deleterious for the union by too severely limiting its constituency and hence its bargaining strength. The Board's goal is to find a middle-ground position, to allocate power between labor and management by "striking the balance" in the appropriate place, with units that are neither too large nor too small.

Consistent with the federal approach under the NLRB, the Delaware PERB has held a proposed bargaining unit need only be an appropriate unit under the criteria set forth in §1310(d) of the PERA; it is not necessary that a proposed unit be the most appropriate unit. *Lake Forest* (Supra., p. 655). It is not necessary that all employees in an appropriate bargaining unit perform the same duties or have identical responsibilities. There may be multiple appropriate units in any workplace.<sup>2</sup>

Procedurally, PERB examines the petitioned-for unit first. If that unit is determined to be an appropriate unit with an identifiable community of interest, the inquiry ends there, consistent with the right of self-determination granted to public employees. An employer who challenges the appropriateness of a proposed unit bears the burden of establishing the unit is clearly inappropriate under application of the statutory criteria; it is not sufficient to simply assert there may be an alternative or more appropriate unit.

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<sup>2</sup> *City of Dover and AFSCME Council 8s*, REP 12-07-870, VIII PERB 5623, 5632 (Del.PERB, 2012).

I. Part-time, hourly, Janitorial Staff

A unit which includes both professional and support positions of a charter school is not presumptively inappropriate. Section 507(b) of the Charter School Act of Title 14 provides that charter school employees have the same rights to organize and collectively bargain as other public school employees. It further states: “A bargaining unit shall not be deemed inappropriate under Chapter 40 of this title, simply because said unit is comprised of professional and non-professional<sup>3</sup> positions within a charter school.”

PERB has previously held the Public Employment Relations Act, 19 Del.C. Chapter 13, neither defines nor excludes durational, seasonal, casual, part-time, or any other category of less than full time positions.<sup>4</sup> The Public School Employment Relations Act also does not contain exclusionary language. Part-time employees are not ineligible or presumptively inappropriate for inclusion in bargaining units with full-time employees, as they enjoy the same rights to be represented for purposes of collective bargaining as other public school employees.

The School has argued that part-time, hourly custodial employees do not share a community of interest with the other bargaining unit positions.

... such factors as the similarity of duties, skills and working conditions of the employees involved; the history and extent of the employee organization; the recommendations of the parties involved; 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 or its designee shall separate supervisory and nonsupervisory employees into separate appropriate bargaining units for all units created subsequent to July 18, 1990. 14 Del.C. 4010(d).

The question presented is whether the custodial employees share a community of

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<sup>3</sup> “Non-professional” is an unfortunate choice of statutory nomenclature to describe non-certificated staff. For purposes of this decision employees holding other than “professional” positions shall be referenced as support employees.

<sup>4</sup> *Delaware Public Employees Council 81, AFSCME, AFL-CIO, and Delaware Turnpike Administration*, REP 95-06-140, II PERB 1189, 1192 (1995)

interest with other positions in the proposed bargaining unit of Odyssey Charter School employees. Unlike traditional public school districts, the School is a single site facility, and a small public school employer. There are nine, part-time hourly employees, who hold positions which are new to the school this year. These employees work 29.5 hours weekly between 5:00 and 11:00 p.m. Monday through Thursday, and from 5:00 to 10:30 p.m. on Friday evenings. They have contracts, but unlike other employees in the proposed unit, they do not receive benefits.

The custodial employees, like the four full-time maintenance employees in the proposed unit, report directly to the Facilities Manager. He is responsible for recruiting, hiring, on-boarding, training, evaluating and evaluating the work of both custodial and maintenance employees. The Facilities Department is responsible to create and maintain a clean, safe, and orderly space for students and staff.

The custodial staff performs primarily housekeeping functions in the evening, when there are few if any students and staff present. Unlike the maintenance staff, the custodians clock in and clock out at the beginning and end of their work periods.

In addition to the nine custodians, the Facilities Department also includes four maintenance employees. Two are classified as Facilities Assistant I positions, which the Facilities Director fills with individuals with experience and certifications in skilled trades. The other two position are Facilities Assistants II, which serve in a supportive role and perform basic maintenance functions.

Comparison of the job descriptions of the Facilities Assistant II (FAII) positions<sup>5</sup> and the Custodian job description<sup>6</sup>, with the Defined Job Responsibilities list<sup>7</sup> reveals more

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<sup>5</sup> Association Exhibit A.

<sup>6</sup> Association Exhibit B.

<sup>7</sup> OCS Exhibit 1.

similarities between these positions than described by the School's witnesses. It is noted that none of the affected employees testified, and that the witnesses repeatedly stated that these are new positions which are still developing. As examples, FAII's "support the evening cleaning crews by maintaining sufficient stock levels of replacement restroom and cleaning supplies." They also maintain building cleanliness during the day, including remediating spills and mishaps and oversee common areas to insure they are clean and safe at all times. FAII's also observe campus conditions, report any unusual circumstances, and assist other facilities employees as necessary.

Similarly, the custodial job responsibilities include maintaining cleanliness of the classrooms, restrooms, locker rooms, hallways, entranceways, utility rooms, cafeterias, and offices. Custodians are responsible to report signs of vandalism or abuse of facilities, heating issues and water leaks, and necessary repairs to the Facilities Manager, a task similar to the FAII's responsibility to observe and report campus conditions. Custodians are also responsible to assist FAII's with set up and clean-up of chairs and tables for school and PTO functions. They also assist FA's with snow and ice removal from entryways. Custodians are also responsible for summer cleaning and general maintenance and may be required to complete "various maintenance projects" according to a schedule established with the Facilities Director for the summer.

It is not necessary that every position in an appropriate bargaining unit perform identical functions. Based on the explicit statutory recognition that bargaining units of charter schools may include both professional and support staff, and the commonalities shared in the supporting functions of the custodians and the Facilities Assistants, I find the custodial employees share a sufficient community of interest with other bargaining unit employees.

Consequently, the custodial positions fall within the scope of the "support staff" in the bargaining unit definition and are eligible to vote in the representation election.

## II. High School Guidance Counselor

The PSERA excludes “public school administrators” and “confidential employees” from the definition of “public school employees” eligible for representation. 14 Del.C. §4002(p). A public school administrator is defined to mean and include, “all public school employees performing primarily administrative functions and employed under an administrative contract by a public school district.” 14 Del.C. §4002(o).

The PSERA also requires that supervisory and non-supervisory employees shall be separated into separate bargaining units for all units created after July 18, 1990. 14 Del.C. §4010(d). A supervisory employee is defined to mean and include, “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.” 14 Del.C. §4002(s).

The School asserts the Upper/High School Guidance Counselor is ineligible for inclusion in this bargaining unit because the position is both supervisory and administrative. It is noted there were no job descriptions, performance expectations or evaluations presented for this position, and the incumbent employee did not testify. The factual determinations and conclusions reached herein are based upon the unrefuted testimony of the Head of School, and are thus contextually and temporally specific to this point in the School’s organizational development.

Supervisory status is not determined by title or classification, but by an employee’s functions, responsibilities and authority in the workplace. The Delaware PERB has followed the NLRB’s guidance in requiring that the burden to establish supervisory status by a

preponderance of the evidence be met by the party asserting that such status exists. Similarly, the PERB has been cautious to narrowly construe the supervisory definition.<sup>8</sup>

The testimony was not sufficient to establish that the Upper/High School Guidance Counselor has authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. The Head of School testified this position is responsible to “assign” faculty and students because the Guidance Counselor has primary responsibility for the academic schedules for all four academic levels.<sup>9</sup>

Scheduling faculty is different and distinct from assigning their work. The testimony was not sufficient to establish that the Guidance Counselor is responsible to assign teachers to particular grades or to teach specific classes, which would require that she have some oversight and conduct evaluation of their performance. Consequently, the record is insufficient to support the determination that the Upper/High School Guidance Counselor is a supervisory employee within the meaning of 14 Del.C.§4002(s).

The record does establish that the Upper/High School Guidance Counselor is responsible for a variety of administrative tasks which are traditionally performed by an Assistant Principal or a Dean of Students. She is responsible for the academic schedule, she has an oversight and coordination function for school-side guidance programming, and she is a member of the academic leadership team. She participates in recommending student discipline.

Because charter schools are not “school districts” and are organizationally different

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<sup>8</sup> *In RE: Sussex County & Communication Workers of America*, REP 07-02-557, VI PERB 3949, 3957 (Del.PERB, 2008).

<sup>9</sup> The Upper/High School Guidance Counselor develops academic schedules for Kindergarten through 2<sup>nd</sup> grade, Grades 3 – 6, Grades 7 –8, and Grades 9 -11, for the 1800 students and 220 staff of the Odyssey Charter School.

from a district, I do not find the question of whether the Upper/High School Guidance Counselor is "... employed under an administrative contract by a public school district" to be dispositive.

Considered in its entirety, the record is sufficient to establish that this position performs a primarily administrative function and is therefore ineligible for representation for purposes of collective bargaining, pursuant to the definition of a public school employee. 14 Del.C. §4002(p).

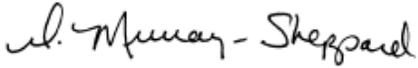
### **DETERMINATION**

For the reasons set forth above, Custodians are determined to share a community of interest with and are appropriate for inclusion in the proposed bargaining unit. Odyssey Charter School personnel employed in part-time Custodian positions are eligible to vote in the representation election.

Based on the current organizational structure and distribution of administrative functions necessary to the effective operations of the Odyssey Charter School, the Upper/High School Guidance Counselor is determined to be an administrative position, within the meaning of 14 Del.C. §4002(o). Consequently, this position is not eligible for representation for purposes of collective bargaining, and is excluded from the scope of the proposed bargaining unit as an administrative position.

### **IT IS SO ORDERED.**

DATE: October 4, 2018

  
DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.