

<hr/>)	
MSAD NO. 29 EDUCATION ASSOCIATION/)	
MEA/NEA,)	
)	
	Petitioner,)	
)	UNIT CLARIFICATION
and)	REPORT
)	
MSAD NO. 29 BOARD OF DIRECTORS,)	
)	
	Public Employer.)	
<hr/>)	

PROCEDURAL HISTORY

This unit clarification proceeding was initiated on August 18, 2004, when Nancy Hudak, MEA UniServ Director, representing the MSAD No. 29 Education Association/MEA/NEA ("Association" or "union"), filed a Petition for Unit Clarification with the Maine Labor Relations Board ("Board") for a determination whether the position of Occupational Therapy Assistant ("COTA")¹ should be added to the MSAD No. 29 educational technician/secretary bargaining unit pursuant to 26 M.R.S.A. § 966(3) of the Municipal Public Employees Labor Relations Law ("MPELRL"). On September 1, 2004, the MSAD No. 29 Board of Directors ("District" or "employer") filed a timely response to this petition. The parties agreed that the matter should be held

¹The incumbent who now holds this position is a "certified occupational therapy assistant," based on her successful completion of a national certification exam. In the exhibits, she is sometimes referred to as a "COTA." The position title contained in the employment agreement entered into by the incumbent and the employer is "Assistant Occupational Therapist" (Exhs. J-1, J-2); the Department of Professional and Financial Regulation rules utilized by the employer in lieu of a job description identifies the job as an Occupational Therapy Assistant. For ease of reference in this report, the position will be called a "COTA" even though it is not clear that certification is required to hold this position.

in abeyance during the remainder of the 2004-2005 school year, but that either party could request that the proceeding be resumed. On July 18, 2005, Ms. Hudak requested in writing that the proceeding be resumed. On August 31, 2005, the hearing examiner conducted a prehearing conference by telephone in this matter. At this prehearing, the party representatives advised the hearing examiner that they believed they could develop a complete stipulated record; however, they were unable to do so. A hearing notice was issued on October 4, 2005, and posted for the information of affected employees. The hearing was conducted on October 17, 2005. The Association was represented by Ms. Hudak. The District was represented by Bruce W. Smith, Esq. The parties were afforded full opportunity to examine and cross-examine witnesses, and to present evidence. The following witnesses were presented at the hearing: for the Association, Susan Clifford, Educational Technician and Association co-president; for the District, Marion Gartley, Special Education Director; Ana Ritchie, Certified Occupational Therapy Assistant; and Superintendent Stephen Fitzpatrick. The party representatives submitted written closing arguments following the conclusion of the hearing. The briefing schedule was complete on November 22, 2005.

JURISDICTION

The jurisdiction of the executive director or his designated hearing examiner to hear this matter and make a determination lies in 26 M.R.S.A. § 966(1) and (3). The subsequent references in this Report are all to Title 26, Maine Revised Statutes Annotated.

EXHIBITS

The following joint exhibits were introduced:

<u>Exhibit No.</u>	Title/Description
J-1	2004-2005 Employment Agreement between Ana Ritchie and MSAD No. 29
J-2	2005-2006 Employment Agreement between Ana Ritchie and MSAD No. 29
J-3	Maine Rule 02-477, Chapter 5 on the role of the occupational therapy assistant
J-4	Job description for Educational Technician I
J-5	Job description for Educational Technician II
J-6	Job description for Educational Technician III
J-7	Job description for Title 1A Ed Tech I
J-8	Job description for Title 1A Ed Tech II
J-9	Job description for Title 1A Ed Tech III

The following Association exhibits were introduced without objection of the District:

A-1	MSAD No. 29 Educational Technician CBA, 2002-04 (11 pages)
A-2	MSAD No. 29 Educational Technician/School Secretary CBA, 2004-06 (12 pages)
A-3	MLRB Form 1, Educational Technicians, 2001
A-4	MLRB Form 1, addition of School Secretaries, 2004
A-5	MSAD No. 29 Teacher CBA, 2005-07 (17 pages)
A-6	MSAD No. 29 "Nurse's Aide" position description
A-7	MSAD No. 29, Eileen McLaughlin 2004-05 Employment and Work Schedule, 7/1/04
A-8	Seniority List, 03-04 - Nurse Assistant (<i>Eileen McLaughlin</i>) (2 pages)
A-9	Seniority List, 04-05 - Nurse Assistant (<i>Eileen McLaughlin</i>) (3 pages)
A-10	COTA Position advertisement, July 12, 2004 (Houlton Pioneer Times)
A-13	U.S. Department of Labor Occupational Outlook Handbook 2004-05 - OTA Description (4 pages)
A-18	Statement, Pamela Cowperthwaite, Special Education Teacher, Houlton High School (2 pages)
A-19	Statement, Laurine Wilson, Grade 1 Teacher, Houlton Elementary School
A-20	Kennebec Valley Community College, OTA program, 5 pages (website)
A-21	York County Community College, Educational Technician program, 3 pages (website)

- A-22 Kittery EA (Support Unit) CBA, first two pages, Recognition Clause, "Health Aide"
- A-23 Wells-Ogunquit Support Staff CBA, first two pages, Recognition Clause, "Assistant Nurse"
- A-24 Education Association of Poland (Support Staff), CBA, first three pages, Recognition Clause, "Nurse Assistant"

The following District exhibits were introduced without objection of the Association:

- ER-3 Ana Ritchie's résumé
- ER-4 Letter from Ana Ritchie to Steve Fitzpatrick - August 27, 2004
- ER-6 Agreement between Anne Cottle, Occupational Therapist, and MSAD No. 29
- ER-7 Anne Cottle's Occupational Therapist License
- ER-8 Anne Cottle's description of the duties of the Certified Occupational Therapist Assistant
- ER-9 Number of ed techs and secretaries assigned to MSAD No. 29 schools
- ER-13 Job description for Educational Technician III
- ER-17 Job description for Secretary - Houlton Elementary School
- ER-18 Job description for Secretary - Houlton Southside School
- ER-19 Ana Ritchie's degree and certifications (5 documents)

STIPULATIONS

The parties stipulated to the following facts, although not necessarily to their relevance:

1. MSAD #29 Education Association/MEA/NEA is the bargaining agent for the Educational Technicians/School Secretaries in MSAD #29 (Houlton).
2. MSAD #29 is a public employer.
3. MSAD #29 employs over fifty (50) educational technicians and secretaries.
4. The unit was organized in 2001 by election. The unit's composition by agreement was "... *all Educational Technicians I,*

II, III employed by the Board for at least six months and otherwise meeting the definition of "Public employee" in 26 M.R.S.A. Section 962(6)(G), excluding the violin strings instructor and the on-call job coach position."

5. The first Collective Bargaining Agreement for the Educational Technician unit was ratified in 2002.

6. The 2002-04 CBA Recognition Clause reads: "... all Educational Technicians I, II, III employed by the Board for at least six months and otherwise meeting the definition of "public employee" in 26 M.R.S.A. Section 962(6)(G), excluding the violin strings instructor and the on-call job coach position."

7. Through an election and by subsequent agreement, School Secretaries were added to the Educational Technician Unit in 2004. The unit composition by agreement became "... all Educational Technicians I, II, III and School Secretaries employed by the Board for at least six months and otherwise meeting the definition of "Public employee" in 26 M.R.S.A. Section 962(6)(G), excluding the violin strings instructor, and the on-call job coach position and secretarial & bookkeeper positions in the Central Office."

8. The 2004-07 CBA recognition language changed to include the School Secretaries as above.

9. The 2004-07 CBA was settled for the purposes of permitting a ratification vote on July 14, 2004.

10. The creation of the "Certified Occupational Therapy Assistant (COTA)" position is a change of circumstances sufficient to permit consideration of the merits of the petition for unit clarification.

11. There is no question regarding representation.

12. The parties are unable to agree on a unit modification.

13. The "Certified Occupational Therapy Assistant (COTA)" position was posted for advertisement on July 12, 2004. The Association President was sent a letter with the advertisement on

that same date.

14. The current COTA position holder ("Assistant Occupational Therapist") signed an Employment Agreement on August 3, 2004, and another on August 1, 2005.

15. A COTA generally requires an Associate's Degree of Applied Science in Occupational Therapy and must also meet continuing educational requirements to meet state and national licensure requirements.

16. The role of the COTA is described in 02-477 Maine Rules, Chapter 5. There is currently no MSAD #29 OTA job description.

18. A certified occupational therapy assistant must work under the supervision of a certified Occupational Therapist. In M.S.A.D. No. 29, Occupational Therapist services are provided by an independent contractor, Anne Cottle, who provides services to the District at the rate of \$62 per hour. Ana Ritchie works under the supervision of Anne Cottle.

19. The COTA was hired by the Superintendent of Schools with the approval of the Board of Directors. She is evaluated by the Director of Special Education (or designee) and the contracted Occupational Therapist. Decisions concerning contract renewal, employee discipline and termination are made by the Superintendent of Schools or his designee.

20. Education technicians generally provide student programming under the direction of certified classroom teachers employed by the District.

21. Responsibility for evaluation, discipline and other decisions concerning employment of Educational Technicians is assigned to the Building Principal, the Special Education Director, or the NCLB Coordinator and the Superintendent, depending upon the position occupied by the educational technician.

22. The role and authorization requirements for educational

technicians are set out in 20-A MRSA § 13023 and Maine Rules 02-071, Chapter 115.

23. An Educational Technician II authorization requires 60 credit hours or more of post-graduate education, and must meet continuing education requirements by state law.

24. An Educational Technician III authorization requires 90 credit hours or more of post-graduate education, and must meet continuing educational requirements by state law.

25. School Secretaries are supervised for employment purposes by Building Principals.

26. The pay and benefits of the Certified Occupational Therapy Assistant are set forth in her individual Employment Agreement. The pay and benefits of members of the bargaining unit are set forth in the collective bargaining agreement.

27. A support staff position in MSAD #29 involving medical skills was that of "Nurse Assistant" and was a part of the bargaining unit under the designation of Educational Technician III. The two previous "Nurse Assistants" were members of the MSAD #29 EA.

28. The most recent "Nurse Assistant" position holder was a registered nurse, with a Bachelor of Science Degree in Nursing.

29. The 2004-05 "Nurse Assistant" has become part of the Teachers' bargaining unit in the 2005-06 school year as a "School Nurse" although it is listed on the district's website as an administrative position. The 2004-05 School Nurse is a member of the SAD #29 Education Association.

30. On September 28, 2004, a third bargaining unit consisting of MSAD #29 Bus Drivers and Custodians was formed as the result of an election.

31. The COTA is not a bus driver or custodian.

32. On January 31, 2005, a fourth bargaining unit consisting of MSAD #29 Cafeteria employees was formed as the result of an election.

33. The COTA is not a cafeteria employee.

34. The Current COTA position holder does not wish to join the SAD #29 Education Association.

35. The Certified Occupational Therapy Assistant does not have a role in administration or collective bargaining for the Ed Tech/School Secretary, Bus Driver/Custodian, Cafeteria Employee or Teacher collective bargaining agreements.

36. The Certified Occupational Therapy Assistant performs direct student services work.

37. Educational Technicians perform direct student services work.

38. The Certified Occupational Therapy Assistant works five days a week, seven hours a day.

39. Educational Technicians and School Secretaries have similar work hours and work days to the COTA.

40. The District has four schools in Houlton and one in Monticello. Members of the bargaining unit work in each school in the District.

41. The Certified Occupational Therapy Assistant has contact with those staff members who work in the Houlton Elementary and the Wellington (Monticello) Schools.

FINDINGS OF FACT

1. Educational Technicians are "authorized" (not certified) by the Maine Department of Education based upon statute and rule. The level at which an Educational Technician is authorized (I, II, or III) depends upon the level of education obtained by the employee. Pursuant to Department of Education Rules 05-071, Chapter 115, Section 10, an Educational Technician I must have a high school degree, an Educational Technician II must have a minimum of 60 credits of approved study in an educationally-related field, and an Educational Technician III must have a minimum of 90 credits of approved study in an educationally-

related field.

2. Some colleges offer a specific course of study for an Associate's Degree in Para-Education (Exh. A-21). However, authorization for Educational Technician II or III does not require taking such a prescribed course of study.

3. Educational Technicians are supervised at different levels and given different responsibility for planning depending on whether they are an Educational Technician I, II, or III. Educational Technician I's are supervised directly by teachers in the classroom. Educational Technician II's are supervised indirectly by teachers in the classroom. Educational Technician III's can work with students anywhere, including off school grounds, and are only indirectly supervised by teachers.

4. In the District, Educational Technicians are paid on a scale set in the collective bargaining agreement based on the type of position they perform, not necessarily based on the educational level that they have achieved.

5. The on-call job coach and the Suzuki violin instructor were excluded from the unit because their hours of employment are infrequent and not regularly-scheduled.

6. Educational Technicians often work with special student populations, such as students with special needs, students requiring extra reading or math instruction (Title 1A), or Native American students.

7. Educational Technicians are sometimes called upon to perform functions that are more medical than strictly educational in nature, such as giving students medications or assisting them with needle sticks for diabetes.

8. Educational Technicians are sometimes called upon to perform "carry over" activities in the classroom as instructed by the Occupational Therapist, Registered (OTR) or by the COTA. These activities might include reinforcing or practicing skills or exercises with a student (such as range of motion), prompting

or modeling for students, or using "experience stories" with children.

9. Most of the Secretaries and the Educational Technicians work during the school year only (i.e., they are not employed or paid during school breaks), although a few work year-round.

10. Most Educational Technicians and Secretaries work 30 to 36 hours per week.

11. The District pays for the services of an OTR as an independent contractor. Pursuant to a contract, the OTR is paid \$62 per hour, with a maximum payment per year of \$49,000 (Exh. ER-6). This therapist generally provides services to students about three days per week.

12. The COTA is supervised by the OTR; this supervision is a requirement of the COTA's license. The employee presently holding the COTA position (Ana Ritchie) requires a "general" level of supervision, based on her experience. This is the lowest level of required supervision, requiring supervisory contact for about one hour out of every 40 hours of services that the COTA provides. This level of supervision is described as follows in Section 2 of the rules of the Board of Occupational Therapy Practice:

General Supervision - Initial direction and periodic review of the following: service delivery, update of treatment plans, and treatment outcomes. The supervisor need not at all times be present at the premises where the occupational therapy assistant is performing the professional services. However, not less than monthly direct contact must be provided, with supervision available as needed by other methods. This supervision is appropriate for an intermediate to advanced occupational therapy assistant.

13. Occupational therapy (OT) in a school setting is the use of purposeful activities to increase the student's ability to participate in school and other activities, including activities

relating to fine motor skills, gross motor skills, visual motor skills, visual perception, sensory integration, and self-help skills.

14. Students with special needs are identified through a meeting of the Pupil Evaluation Team (PET), a team made up of the Special Education Director, the student's teachers and parents, and others who will work with the student. As a result of a PET, an Individual Educational Plan (IEP) is developed for the student.

15. Some students with special needs require OT services, a need identified in their IEP. A student needing OT services is first assessed by the OTR, who recommends OT services if needed and who develops a therapy plan for the student. Only the OTR is qualified to perform this initial assessment and planning.

16. After the initial assessment and planning, OT services to students in the District are either provided by the OTR or by the COTA. Only the OTR or the COTA are qualified to provide OT services. Students may see either the OTR or the COTA, as both are qualified to provide the on-going OT services.

17. If the COTA provides services to a student, the COTA then may attend future PET meetings in order to report on the student's progress or to recommend changes to the student's OT program.

18. Some students with special needs require adaptive equipment (slant board, weighted pencils, etc.). Only the PET can require the use of such equipment. Part of the job of the OTR and the COTA is to recommend and use such equipment with the student. The COTA has sometimes fabricated adaptive equipment as necessary, based on her expertise. Educational Technicians and other staff members might work with a student utilizing the adaptive equipment, as instructed by the OTR or the COTA.

19. Ms. Ritchie has been employed by the District as a COTA in the 2004-2005 and 2005-2006 school years. She has negotiated

individual contracts of employment with the Superintendent for each of the school years (Exhs. J-1, J-2). She is the first COTA employed by this District.

20. Ms. Ritchie graduated from St. Philip's College (San Antonio, Texas) with an Associate of Applied Science Degree (Occupational Therapy Assistant) in 1999. Ms. Ritchie's course of study included two school years of classes in such areas as anatomy, kinesiology, and summer clinical work. In 1999, she passed a national board exam which allows her to be called a "certified" occupational therapy assistant. She is licensed as a COTA in Texas, Louisiana, and Maine.

21. Ms. Ritchie works in the two elementary schools maintained in the District. For most of her workday, she sees students on a one-to-one basis, providing OT services as established in the program created by the OTR. This therapy might consist of working on gross motor skills, sensory integration, tactile activities, or working on specific goals like handwriting and typing. She usually sees students in one-half hour sessions, two times each week.

22. Ms. Ritchie works five days per week, seven hours per day, during the school year only.

23. Ms. Ritchie usually works with students in a separate room designated for that purpose in each school or, sometimes, in the student's classroom or other areas of the school. She has frequent contact with the Special Education Director and other staff members (Teachers, Educational Technicians) who work with the students with whom she works.

24. Both Ms. Ritchie and the OTR train Educational Technicians, other staff, and parents to perform "carryover activities" to build on the progress made in OT sessions.

25. Ms. Ritchie advised the Superintendent recently that she was offered a full-time job by an area home health agency that paid \$20 per hour. However, for a variety of reasons

(including the schedule and client population), Ms. Ritchie preferred to remain in the employ of the District. She has agreed to work for the home health agency during school breaks.

26. The District feels fortunate to be able to employ Ms. Ritchie as there is a shortage of all therapists (occupational, speech, etc.) available to provide services to students with special needs. The District is the only school district in Aroostook County known to the Special Education Director to have a COTA as an employee. If the District did not employ Ms. Ritchie or a comparable COTA, the OT services needed by students (after the initial assessment and treatment plan) would have to be provided by an OTR, if one was available. If the District did not provide OT services required by students' IEP's, they might be "out of compliance" with the laws relating to the provision of services to students with special needs.

27. The 2004-2007 CBA for the Educational Technicians bargaining unit has two wage scales--one for Educational Technicians (I, II, and III) and one for Secretaries. If the COTA was made part of this bargaining unit, the District might consider negotiating a separate (third) wage scale.

28. The District and the Association have agreed that certain employees are in this bargaining unit and covered by the CBA even though not specifically employed as an Educational Technician or as a Secretary. Such employees have included non-certified Librarians, Nurse Assistants, Librarian/Secretaries, and Study Room Monitors. Such employees have generally been placed on the Educational Technician wage scale, depending on their education and experience.

29. The District has, at times, employed a Nurse Assistant (also called a Nurse's Aide). This employee generally is a LPN, or holds an equivalent educational degree. This employee is supervised by the District Head Nurse and the school Principal. Several years ago, the District employed a Nurse Assistant. She

was first placed on the Educational Technician II wage scale and then, when she earned additional credits, was placed on the Educational Technician III wage scale.

30. After the employee who most recently held the Nurse Assistant position left employment, another employee was hired. She had a Bachelor's of Science degree. She petitioned the Superintendent to have her position reclassified. The Superintendent denied the petition, but the School Board eventually made the employee the Head Nurse. After this, the employee was considered part of the Teachers' bargaining unit, which includes all certified classroom Teachers, Teaching Principals, Acting Principals, and "educational specialists" such as Librarians, Guidance Counselors, School Nurses, and the 21st Century Liaison.

31. A Speech Therapist employed by the District is also considered part of the Teacher's bargaining unit.

32. There are approximately 58 Educational Technicians and five Secretaries employed by the District.

DISCUSSION

Section 966(3) of the Municipal Public Employees Labor Relations Law (MPELRL) provides:

3. Unit clarification. Where there is a certified or currently recognized bargaining representative and where the circumstances surrounding the formation of an existing unit are alleged to have changed sufficiently to warrant modification in the composition of that bargaining unit, any public employer or any recognized or certified bargaining agent may file a petition for a unit clarification provided that the parties are unable to agree on appropriate modifications and there is no question concerning representation.

The parties have agreed that all four requirements of § 966(3) are present here; namely, that the Association is the certified bargaining agent for the Educational Technician and Secretary

bargaining unit, that no question exists concerning representation, that the parties have been unable to reach agreement on the issue of whether the COTA should be part of the bargaining unit, and that the circumstances surrounding the formation of the bargaining unit have changed sufficiently to warrant modification of the unit. The creation of a new job classification normally meets the requirement of changed circumstances, as it is impossible to consider the bargaining unit status of a position before it exists. MSEA and State of Maine Department of Inland Fisheries and Wildlife, Nos. 83-UC-43 and 91-UC-11, at 8 (MLRB May 4, 1993). Further, the employer has not argued that the COTA is excluded from the definition of "public employee" under § 962(6). Therefore, the only issue presented here is whether the COTA position has a "community of interest" with the other positions currently in the bargaining unit:

Title 26 M.R.S.A. § 966(2) requires that the hearing examiner consider whether a clear and identifiable community of interest exists between the positions in question so that potential conflicts of interest among bargaining unit members during negotiations will be minimized. Employees with widely different duties, training, supervision, job locations, etc., will in many cases have widely different collective bargaining objectives and expectations. These different objectives and expectations during negotiations can result in conflicts of interest among bargaining unit members. Such conflicts often complicate, delay and frustrate the bargaining process.

AFSCME and City of Brewer, No. 79-A-01, at 4, 1 NPER 20-10031 (MLRB Oct. 17, 1979).

In determining whether employees share the requisite "community of interest" in matters subject to collective bargaining, the following factors, at a minimum, must be considered: (1) similarity in the kind of work performed; (2) common supervision and determination of labor relations policy; (3) similarity in the scale and manner of determining earnings;

(4) similarity in employment benefits, hours of work and other terms and conditions of employment; (5) similarity in the qualifications, skills and training among the employees; (6) frequency of contact or interchange among the employees; (7) geographic proximity; (8) history of collective bargaining; (9) desires of the affected employees; (10) extent of union organization; and (11) the employer's organizational structure. See Chapter 11, Sec. 22(3) of the Board Rules. The hearing examiner will address each factor, in turn, below.

(1) Similarity in the kind of work performed. Both parties submitted testimony and argument on the issue of whether Educational Technicians ever perform functions like a COTA, or whether the "carry-over" therapy activities sometimes performed by Educational Technicians are like the activities performed by the COTA. While this information is not irrelevant, it is entirely too narrow in focus. The Board has never required that positions in a bargaining unit be identical or perform identical functions. As the executive director noted in a previous decision, Auburn Education Ass'n/MTA/NEA and Auburn School Committee, No. 91-UD-03, at 11, aff'd, No. 91-UDA-01 (MLRB May 8, 1991):

In comparing the nature of the work being performed by the various classifications under consideration, the essence or basic type of the functions being performed is far more important than the details of each position's work responsibilities. Inherent in the existence of separate job classifications is a difference in the specific work assignment of each classification; however, such differences do not preclude the inclusion of various classifications in the same bargaining unit.

Many school "support staff" bargaining units contain a variety of positions, with the similarity of the work performed by the positions being that the positions work in some direct contact with students in order to improve learning outcomes for those students, and to support the educational mission of the school.

See, e.g., East Grand Teachers Ass'n/MTA/NEA and MSAD No. 14 Board of Directors, No. 92-UD-01 (MLRB Oct. 1, 1991) (approving unit consisting of teachers' aides, school secretaries, food service director, bus drivers and custodians); Lubec Education Ass'n/MTA/NEA and MSAD No. 19 Board of Directors, No. 83-UD-17 (MLRB Apr. 13, 1983) (approving unit consisting of teachers' aides, secretaries, cooks, plant operator, bus drivers and custodians). Likewise here, the COTA works with individual students with special needs in order to enhance their ability to participate in school functions, an essential job function not unlike that of the other positions currently in the bargaining unit. The job of the COTA is the most similar to that of the Educational Technicians, as both positions work directly with students (often with special needs), work closely with other staff to improve outcomes for students, and attend PET's.

The fact that the COTA performs more "health" or "therapy" related functions than the Educational Technicians or the Secretaries does not place her in a unique position, when compared to the placement of similar positions in school bargaining units. For example, school nurses are routinely included in teacher bargaining units. See, e.g., Lewiston Teachers Ass'n and Lewiston Board of Education, No. 80-UC-01, at 5 (MLRB Sept. 25, 1979) (finding that school nurses, teachers and guidance counselors work in a similar capacity with respect to the students, must cooperate in their health, education and guidance, and belong in the same bargaining unit).² The

²See also the following cases all approving the placement of Nurses in Teacher bargaining units: Union 29 Teachers Ass'n and Mechanic Falls School Committee, Nos. 92-UC-03 (MLRB Nov. 17, 1992); Orono School Committee and Orono Teachers Ass'n, Nos. 89-UD-04 and 89-UC-02 (MLRB Dec. 14, 1988); and Tri-Town Teachers Ass'n and MSAD No. 52, No. 84-UC-06 (MLRB Aug. 27, 1984). As noted in Union 29, supra, if nurses were not included in units with educational professionals, one-person nurse units would "proliferate" in school systems. Id. at 16.

functions performed by the COTA do not make her any more dissimilar from Educational Technicians than Nurses are from Teachers. Indeed, in this District, both the Head Nurse and the Physical Therapist are in the Teacher bargaining unit, while the Nurse Assistant (when one was employed) was in the Educational Technician bargaining unit. This strongly suggests that the COTA's position is sufficiently similar to the positions of the Educational Technicians and Secretaries to be placed in that unit.

(2) Common supervision and determination of labor relations policy. Several positions supervise the Educational Technicians and the Secretaries. The Educational Technicians are supervised by either the Special Education Director, the School Principals, or by the NCLB Coordinator, depending on the exact nature of their duties. The Secretaries are supervised by the School Principals. All of these positions are ultimately supervised by the Superintendent. The COTA is supervised on a day-to-day basis by the Special Education Director, as the students with whom she works are identified as having special needs. The Superintendent also determines "labor relations policy" regarding the COTA. It was he who bargained the individual contracts of employment with the COTA. There exists, therefore, a significant similarity in the supervision of these positions.

The COTA is also supervised by an OTR. This supervision is a requirement of the COTA's professional license and will be required (presumably) no matter where the COTA works, as long as she remains an occupational therapy assistant. The hearing examiner does not believe that this places the COTA in a significantly different position from the Educational Technicians and Secretaries for several reasons. First and foremost, this community of interest factor refers to supervision relating to the terms and conditions of employment; that is, the matters that will be the subject of collective bargaining. The OTR, who is

herself only an independent contractor of the employer, has no control over the terms and conditions of the COTA's employment-- the hours of working, the pay and benefits, discipline, and contract renewal are all strictly controlled by employees of the District (the Special Education Director or the Superintendent). Even if, giving a hypothetical example, the OTR reported to the employer that the COTA was doing a poor job professionally, it would be strictly up to the employer what to do with that information as it related to the COTA's job. Second, the Educational Technicians must also be supervised by Teachers in either a direct or indirect fashion, depending on whether they are an Educational Technician I, II, or III. Yet, the Teachers are not considered the "supervisors" of the Educational Technicians within the chain-of-command of the District, which is a similar supervisory arrangement to the manner in which the OTR oversees some aspects of the work of the COTA. Finally, the amount of supervision that the OTR provides to the COTA is relatively minimal. The COTA meets with the OTR no more than once per week, and is only required to meet for supervision "not less than monthly" pursuant to Board of Occupational Therapy Practice regulations.

The supervision of the COTA is sufficiently similar to the supervision of the positions of the Educational Technicians and Secretaries to be placed in that unit.

(3) Similarity in the scale and manner of determining earnings. This is the second school year that the District has employed the COTA, with the hourly rate of pay negotiated individually between the COTA and the Superintendent. During the first year of employment, the COTA was paid \$15.43 per hour. During the present school year, the COTA is paid \$15.89 per hour (representing a 3 percent pay increase). During the 2004-2005 school year, the wage scale for Educational Technician II's was \$11.11 to \$12.13 and for Educational Technician III's was \$14.94

to \$15.96. During the 2005-2006 school year, the wage scale for Educational Technician II's was \$11.44 to \$12.49 and for Educational Technician III's was \$15.39 to \$16.44.³ Arguably, with the COTA's clinical education and experience, she should be compared to the wage scale of the Educational Technician III's. The hourly pay that the COTA individually negotiated falls squarely within the wage scale for this position. The Association and the District also negotiated a 3 percent wage increase for employees in the bargaining unit for the 2005-2006 school year.

There was testimony that the COTA could earn considerably more (\$20 per hour) from other employers. This may be, but this is entirely too speculative a consideration for purposes of the issue here. Just as the hearing examiner cannot exclude a position from a unit based upon projected future duties, she cannot exclude a position because the employee might be able in the future to negotiate wages higher than the present scale. Cf. Auburn Firefighters Ass'n and City of Auburn, No. 83-A-07, at 7 (MLRB Dec. 5, 1983). In any event, as the employer agreed, the parties could negotiate a separate wage scale for the COTA, just as the parties have negotiated separate wage scales for the Educational Technicians and the Secretaries, if her position was determined to require such a separate scale.

The COTA is paid on an hourly basis for employment during the traditional school year. She is paid on a bi-weekly basis. Therefore, the COTA's scale and manner of determining earnings is almost identical to that of all positions in the present bargaining unit (with the exception of a few Educational Technicians and Secretaries who are employed on a year-round

³The wage scale for the Secretaries in the 2005-2006 school year was \$10.42 to \$11.24. However, with the COTA's educational background, she is more properly compared to the educational technician II's or III's.

basis).

(4) Similarity in employment benefits, hours of work and other terms and conditions of employment. The benefits that the COTA has negotiated in her individual employment agreements (health insurance, holidays, sick days, course reimbursement) are virtually identical to the benefits negotiated for the unit members in the collective bargaining agreement. In her 2005-2006 employment agreement, the COTA negotiated for three bereavement days and two personal days, which was the same already provided to unit members in the collective bargaining agreement. In both employment agreements, the COTA negotiated five professional days per year for "activities relating to licensure" (Exhs. J-1, J-2). This appears to be a similar benefit to that provided to Educational Technicians in Article XVII of the collective bargaining agreement ("The Board will provide each educational technician with district in-service days for authorization or re-authorization credits"). Even if these benefits are not equivalent, this is the only difference in benefits provided, and it is not significant when the entire benefit package is considered as a whole. The COTA's hours of work are similar to the hours of work for the other positions in the unit. The terms and conditions of employment are similar, except for obvious differences related to the fact that the COTA has negotiated an individual employment agreement on a yearly basis which does not contain the usual protections of a collective bargaining agreement (just cause provision, grievances, etc.). All of these factors strongly suggest a similarity between the COTA's position and the positions in the unit.

(5) Similarity in the qualifications, skills and training among the employees. The positions in the present unit require various qualifications, skills and training. The positions require a range of education, from a high school degree (for Secretaries, Educational Technician I's) to 90 credits or more of

post-secondary credits in an educationally-related field (for Educational Technician III's). The unit does not contain positions typically considered professional, or requiring a four-year degree or a higher level of education. In this regard, the COTA position has a significant level of similarity with the positions in the unit. The two-year degree (plus clinical training) required of the COTA position falls between the educational level required of Educational Technician II and III. The employer argued that the two-year degree required of the COTA is a more specific course of study than that required of Educational Technicians. That may be true, but state regulations still require that post-secondary credits for Educational Technician II's and III's must be approved study in an educationally-related field. Specific two-year degrees are also available with a focused course of study for para-educational employees that may be used to satisfy the educational requirements for authorization (Exh. A-21). In addition, both COTA's and Educational Technicians must meet continuing educational requirements to maintain their licensure (in the case of the COTA) or authorization (in the case of the Educational Technician). Levels of experience and training differ within the unit, and are reflected in the wage scale.

As more fully described in the discussion regarding the first community of interest factor (similarity of kind of work performed), the qualifications, skills and training required of various positions in the same bargaining unit do not need to be identical. The parties need to look no further for proof of this than the fact that, when a Nurse Assistant (an LPN) was employed by the District, the position was placed in this bargaining unit, on the Educational Technician wage scale. A position with that level of education and focused type of medical education was determined to "fit" within this bargaining unit, much as nursing and guidance positions with four-year degrees "fit" within the

Teachers' bargaining unit. There is certainly sufficient similarity between the qualifications, skills and training of the COTA for her to be placed in the Educational Technician and Secretaries bargaining unit.

(6) Frequency of contact or interchange among the employees and (7) Geographic proximity. The COTA works regularly in two of the five schools maintained by the district, and has contact and interchange with employees in those two schools. Her work with students is relatively "private," yet she may have extensive interchange with certain Educational Technicians and other District employees who work with students who need OT services. Many unit employees work at only one school, limiting the amount of contact and interchange to other employees within that school; that is a common circumstance in many school units. Considering this fact, the COTA's work situation allows sufficient contact to allow the interchange of ideas among employees in the unit.

(8) Collective bargaining history. The COTA position is new in the District and has never been organized in a bargaining unit. As described previously, other positions employed by the District with medical qualifications (Nurse Assistant, School Nurse) have been placed in bargaining units.

(9) Desires of employees. The employee who holds the COTA position does not wish her position to be in the bargaining unit. She apparently believes that the union does not understand the true nature of what she does and will not adequately represent her. The hearing examiner gives this factor full weight, just as she gives weight to the employer's articulated desire to retain this particular person in their employ as a uniquely-qualified individual. At the same time, the hearing examiner cannot give this factor *more* weight than all of the other factors, when most of those factors clearly support a finding that this position shares a community of interest with the other positions in the unit. The hearing examiner must evaluate the community of

interest factors as they relate to the *position*, not only information relating to a particular employee holding that position.

(10) Extent of organization. The union has organized and been certified the representative of four bargaining units in the district, a significant level of organization. As the executive director has noted in a previous decision, there is generally no "mystery" to the different types of job classifications in a school setting and how they are typically grouped:

The kinds of work in a typical school milieu are: (1) administrators supervising professional and non-professional employees, (2) teachers and other educational specialists such as counselors or librarians participating directly in the educational process, (3) educational support personnel providing direct support to the educational process, and (4) non-educational support staff performing the manual or mechanical work to keep the department's physical plant in operation.

Auburn Education Ass'n/MTA/MEA and Auburn School Committee, No. 91-UD-03, at 11, aff'd, No. 91-UDA-01 (MLRB May 8, 1991). In this District, the Teachers, educational support personnel, and non-educational support staff are all organized. Therefore, unless a new position is a supervising administrator or some other position excluded by law from engaging in collective bargaining, that position very likely shares a community of interest with those in one of the organized units. The COTA position is not a supervising administrator or other statutorily-excluded position. An evaluation of the community of interest factors suggests strongly that the position belongs in a bargaining unit with direct educational support personnel.

(11) Employer's organizational structure. As the District is not "departmentalized" in the usual sense of this word, this factor is not useful in making the present determination.

Finally, the employer argued that, in addition to considering the traditional community of interest factors, the

hearing examiner consider its "public policy" argument. The employer argued that the scarcity of employees with qualifications like the COTA make her unique--and far less fungible than, for example, Educational Technicians. The employer further argued that the union will be unlikely to advocate for her (in terms of pay, apparently), will treat her like an Educational Technician, and the employer will lose a very valuable employee. The hearing examiner accepts, because these facts were not refuted by the union, that employees like the COTA are a scarce and valuable resource for the District, particularly considering its legal obligation to serve students with special needs. At the same time, the COTA has not negotiated for herself any more advantageous terms than the union has negotiated for positions in the bargaining unit. The Superintendent practically testified that he wants to give the COTA a higher rate of pay but still negotiated with her only the same pay increase that the organized employees received. The hearing examiner cannot assume that the dire predictions of the employer will occur, nor can she base her decision on such assumptions. Rather, the hearing examiner assumes that the union will uphold its legal duty to fairly represent the COTA, and that both parties will negotiate in good faith an agreement that fairly compensates all positions in the unit. To assume anything different would be the contravention of the "public policy" as expressed in the MPELRL.⁴

For all of these reasons, the hearing examiner concludes that the majority of factors strongly supports a finding that the

⁴AFSCME, Council 74 and City of Brewer, No. 79-A-01 (MLRB Oct. 17, 1979), the case cited by the employer for the proposition that public policy should be considered, involved a unique situation wherein emergency dispatchers had a history of neglecting calls from fire and ambulance, and favoring police calls. Including the dispatchers in the police unit raised a serious continuing public safety issue. The argument the employer advances here is, in actuality, not unique: the employer simply wishes to be free to negotiate individually with the employee in question.

COTA position shares a community of interest with the Educational Technicians and Secretaries currently in the bargaining unit, and that this new position should be included in that unit.

CONCLUSION

On the basis of the foregoing facts and discussion, and pursuant to 26 M.R.S.A. § 966(3), the union's Petition for Unit Clarification, seeking to add the COTA position to the Educational Technician/Secretary bargaining unit, is granted.

Dated at Augusta, Maine, this 23rd day of December, 2005.

MAINE LABOR RELATIONS BOARD

/s/ _____
Dyan M. Dyttmer
Hearing Examiner

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 968(4), to appeal this report to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within fifteen (15) days of the date of issuance of this report. See Chapter 10 and Chap. 11 § 30 of the Board Rules.