STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 05-UC-02
Issued: October 19, 2005

ASHLAND AREA TEACHERS ASSOCIATION/ MEA/NEA, Petitioner, and MSAD NO. 32 BOARD OF DIRECTORS, Public Employer.	UNIT CLARIFICATION REPORT

PROCEDURAL HISTORY

This unit clarification proceeding was initiated on April 4, 2005, when Nancy Hudak, MEA UniServ Director, representing the Ashland Area Teachers Association/MEA/NEA ("Association"), filed a Petition for Unit Clarification with the Maine Labor Relations Board ("Board") for a determination whether part-time certified personnel should be added to the MSAD No. 32 certified personnel bargaining unit pursuant to 26 M.R.S.A. § 966(3) of the Municipal Public Employees Labor Relations Law ("MPELRL"). On April 15, 2005, the MSAD No. 32 Board of Directors ("District" or "employer") filed a timely response to this petition. A hearing notice was issued on June 7, 2005, and was posted for the benefit of affected employees. The hearing examiner conducted a pre-hearing conference by telephone in this matter on June 29, 2005. The hearing was conducted on July 6, 2005. The Association was represented by Ms. Hudak. The District was represented by S. Campbell Badger, 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, Peter Belskis, teacher and Association president; for the District, Superintendent Roland

Caron. The party representatives presented oral closing arguments at the hearing, and also written closing arguments following the conclusion of the hearing. The briefing schedule was complete on September 7, 2005.

While the bargaining unit here contains some non-teaching certified employees (such as librarians), the hearing examiner will sometimes refer to the positions in the unit as "teachers." This is meant to include all certified personnel within the meaning of the parties' collective bargaining agreement.

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 Association exhibits were introduced without objection of the District:

Exhibit No.	Title/Description
A-1	School Board Agenda 5/23/05
A-4	Beaulier salary agreement 04-05
A-5	Cyr salary agreement 04-05
A-7	Haines salary agreement 04-05
A-8	AATA dues list
A-9	Carson MEA membership form 8/01
A-10	MEA roster 02-03
A-11	MEA roster 03-04
A-12	Arndt MEA membership form 8/03
A-13	MEA roster 04-05
A-14	Seniority list 04-05
A-15	Note w/librarian contracts

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

B-1	Form 1 dated 8/22/74
B-2	Form 1 dated 11/11/71
B-3	Arndt probationary teacher contract 02-03
B-4	Arndt employment stipulation 8/04
B-5	Carson probationary teacher contract 01-02
B-6	Carson probationary teacher contract 02-03
B-7	Cyr salary agreement 04-05
B-8	Cyr probationary teacher contract 93-94
B-9	Bradbury probationary media specialist contract 01-02
B-10	Graham administrator's contract 00-01
B-11	Bushey administrator's contract 92-94
B-12	Farrin probationary director of media services contract 88-89
B-13	Seniority list 04-05
B-14	Seniority list 03-04
B-15	Seniority list 02-03
B-16	Seniority list 01-02
B-17	Seniority list 93-94
B-18	Seniority list 88-89
B-19	MEA Governance
B-20	MEA Constitution

The following joint exhibits were introduced:

J-1	Collective Bargaining Agreement 04-06
J-2	Collective Bargaining Agreement 01-04

STIPULATIONS

The parties stipulated to the following facts (in these stipulations, the term "Board" refers to the employer, not to the MLRB):

1. The current Collective Bargaining Agreement Recognition Clause (Article II) reads, *"The Board hereby recognizes the Association as the exclusive bargaining agent as defined in 26 M.R.S.A. section 962(2) for the entire group of full time certified personnel having more than six (6) months service in the District, excluding the Superintendent, Principals, Assistant Principal, and Supervisors.*

Unless otherwise indicated, the term "teacher", when used hereinafter in this Agreement, shall refer to all professional

employees represented by the Association in the negotiating unit as above defined."

2. MSAD #32 is a public employer.

3. The first (teachers) Collective Bargaining Agreement went into effect *"...as of the beginning of the 1973-74 school year."*

4. A Form 1 was filed with the Maine Labor Relations Board on November 11, 1971, describing the bargaining unit as including "classroom teachers, guidance counselors, librarians, special education teachers and vocational education teachers".

5. On August 22, 1974, the parties filed a second Form 1, describing the bargaining unit as follows: *"The entire group of full time certified personnel having more than six (6) months' service in the District, excluding the Superintendent, Assistant Superintendent, Principals, Assistant Principals, and Supervisors."*

6. During the 2001-02 and 2002-03 school years, the district employed a half-time Math/Spanish teacher.

7. The 2004-06 collective bargaining agreement was ratified by the parties in April, 2005. Final signatures were affixed on June 24, 2005.

8. During the negotiations for the most recent collective bargaining agreement, the Association proposed changing the recognition clause to include part-time teaching positions in the bargaining unit.

9. Before the parties reached impasse, the Board demanded the Association remove the proposal to include part-time teachers from the table as a permissive subject.

10. In August, 2004, the individual who previously held the Librarian position was given a contract for a part-time Pre-K through 12 “Library Consultant” position. Previously, the Library/Media Specialist position had been a full time position.

11. The position’s 2004-05 salary agreement provided salary and benefits similar to, but not the same as, those of full-time teachers.

12. Said individual has since resigned from the district.

13. On May 17, the Board accepted a tentative 2005-06 school budget which would have reduced several full-time positions to part-time.

14. The Board ultimately approved a school budget for the 2005-06 school year that did not result in the reduction of full time positions to part-time positions.

15. The 2004-05 CBA contains the following new language in regards to Reduction in Force: *“Whenever it becomes the intention of the administration of MSAD #32 to recommend the elimination of a teaching position or a part thereof, ...”*

16. SAD #32 has two buildings in Ashland, less than 1/4 mile from each other.

Although for the purposes of this Unit Clarification the Board declines to categorize part-time positions as being within the teachers bargaining unit, the parties agree that should part-time positions be so categorized in the future, like full-time teachers:

17. Part-time teachers would not have an administrative role in collective bargaining for the Teacher Collective Bargaining Agreements.

18. Part-time teachers would make no personal decisions to hire, promote, discharge or discipline employees or effectively recommend such personnel actions.

19. Part-time teachers would have no significant duties in the observation and evaluation of employees where such observations and evaluations play a substantial role in reappointment, non-reappointment, grant of continuing contract status, award of merit pay or promotion.

20. Part-time teachers would not exercise independent judgment in the ranking of subordinates for the purposes of establishing an order of lay-off or re-call beyond merely ranking by seniority.

21. Part-time teachers would have no significant discretion in the promulgation or execution of a working budgetary document for an area of responsibility.

22. Part-time teachers would have no non-ministerial ability to grant or deny the use of vacation, sick, bereavement, educational or other leaves of absence.

23. Part-time teachers would have no settlement authority in grievance procedures.

24. Part-time teachers would be performing professional work identical to full-time teachers in MSAD #32.

25. Part-time teachers would be supervised by the school Principals.

26. Part-time teachers would have similar qualifications, skills and training to full-time teachers in MSAD #32.

27. Part-time teachers would have frequent contact with full-

time teachers and other SAD #32 staff members.

FINDINGS OF FACT

1. The Association is the certified bargaining agent for the bargaining unit consisting of the following MSAD No. 32 employees: the entire group of full-time certified personnel having more than six (6) months' service in the District, excluding the Superintendent, Principals, Assistant Principal, and Supervisors.

2. On July 3, 1974, during the term of the parties' collective bargaining agreement, the employer filed a Petition for Unit Determination, seeking to exclude the position of Assistant Principal from the bargaining unit. A unit determination hearing was scheduled in the matter, but not conducted.

3. The parties filed an Agreement on Appropriate Bargaining Unit on August 22, 1974, (further described in Stipulation No. 5) which, in part, excluded the Assistant Principal position from the bargaining unit.

4. Each school year, the District produces a seniority list of certified personnel. The list is either posted or passed around, and employees are asked to make any corrections to the list. Article 6 of the parties' collective bargaining agreement ("CBA") defines "seniority"; the article requires the employer to provide to the Association and post a seniority list each year no later than November 30.

5. The District has rarely employed teachers on a part-time basis. Around 1993, one teacher (Linda Caron) was employed for a year or two at sixth-sevenths or five-sevenths time. Ms. Caron's name was on the seniority list dated August 26, 1993, with a hire date given as August 9, 1993 (B-17).

6. During the 2001-2002 school year, the District employed a half-time math teacher (Peg Carson). Ms. Carson was given a probationary teacher's employment contract for the year (B-5).

This was the "standard contract" given to all probationary teachers, including full-time probationary teachers, during the first two years of employment. In the contract, Ms. Carson was paid one-half of the annual salary rate as provided in the collective bargaining agreement.

7. During the 2002-2003 school year, the District employed Ms. Carson as a half-time math/Spanish teacher. She was again given a standard probationary teacher's contract for the year.

8. When Ms. Carson worked for the District, she also worked half-time for another school district. Ms. Carson asked the Association president whether she could arrange to pay half of the Association dues during her employment. The Association president spoke with personnel from the District's central office about this, and the employer thereafter deducted half dues from her salary.

9. Ms. Carson's name was not on the seniority lists produced in September, 2001, or in September, 2002.

10. During the 2002-2003 school year, the District employed a full-time media specialist (Melissa Arndt). Media specialist (or librarian) was a position requiring certification, and was therefore a bargaining unit position. Ms. Arndt had "conditional" certification for this position. Ms. Arndt was given the standard probationary teacher's contract, paying the annual salary rate as provided in the collective bargaining agreement (B-3).

11. Ms. Arndt was also employed on a full-time basis in the same position by the District during the 2003-2004 school year. She was again given a standard probationary teacher's contract.

12. During the 2004-2005 school year, the District offered Ms. Arndt only a half-time position. Ms. Arndt had not fulfilled all the requirements to maintain her "conditional" certificate. However, the primary reason the District offered her only a half-time position was budget constraints (Tr. at 91). Under a

revised state school funding formula ("Essential Programs and Services"), the District student population was deemed too small to warrant a full-time media specialist.

13. Ms. Arndt was given a written "employment stipulation" for the 2004-2005 school year as a library consultant (B-4). This stipulation was not in the form of a standard teacher's contract in the District. The stipulation identified the number of days Ms. Arndt was to work as 90, with a daily rate of remuneration.

14. Ms. Arndt had Association dues deducted in 2002-2003 and 2003-2004. She continued to have dues deducted in 2004-2005 after her position was changed to a half-time library consultant. However, sometime after the first pay period of the 2004-2005 school year, the District refused to deduct the Association dues any longer from her salary.

15. Ms. Arndt's name appeared on the September, 2002, and the September, 2003, seniority lists. Her name did not appear on the September, 2004, seniority list.

16. Ms. Arndt resigned from her half-time position around January, 2005. She no longer works for the District.

17. The District has employed Janice Cyr since 1993. She is currently employed as a speech/language pathologist. She has a professional license as a speech/language pathologist. She does not currently have a teacher's certification from the state Department of Education.

18. Ms. Cyr was initially hired by the District as a teacher of speech/language. She was given the standard probationary teacher's contract for the 1993-1994 school year (B-8). For the school year 2004-2005, she was given a "notification of annual salary rate," which is a standard document given to teachers who have completed their probation (B-7). This notification read, in part:

> You are hereby notified that the salary schedule of the collective bargaining agreement provides an annual rate of $42,224*

> payable in 26 installments for the school year beginning August 19, 2004, and ending August 31, 2005...It is understood that the salary is for step M-15 of the 2003-2004 salary schedule. [*2004-2005 salary to be determined by negotiations between the parties pursuant of Chapter 9A, Title 26 MRSA]

19. Ms. Cyr works for the District on a part-time basis (three-fifths time). She has worked part-time for at least the last six years (since the present superintendent has been employed by the District), possibly during her entire period of employment. Ms. Cyr is paid the equivalent of a full-time teacher's salary under the collective bargaining agreement, based on her years of employment and education.

20. Ms. Cyr's name has appeared on all post-1993 seniority lists submitted into evidence (1993, 2001, 2002, 2003, and 2004).

21. During many years of her employment, Ms. Cyr elected to have Association dues deducted from her salary. Several years ago, Ms. Cyr advised the Association president that since she belonged to another professional association that provided insurance to her, she no longer wished to pay Association dues. Thereafter, the District stopped deducting Association dues from her salary.

22. For over 13 years, the District has employed Susan Beaulier as a full-time teacher holding two half-time positions (gifted/talented and art). In the 2004-2005 school year, she was given a standard notification of annual salary rate, similar in form and language to the one given to Ms. Cyr.

23. At the end of the 2004-2005 school year, the positions of Ms. Beaulier and several other full-time teachers were threatened to be reduced to part-time (positions eliminated, and replaced with a part-time position). This was due to budget constraints under the school funding formula. This generated considerable attention from parents and citizens, and the school board decided to add money to the proposed budget in order to maintain the

teachers at a full-time level. This budget was passed, and the threatened reductions to part-time teaching positions did not occur.

24. The superintendent is concerned that due to the school funding formula and the student population, there will be increased pressure on the District in the future to either reduce full-time positions to part-time, or to hire part-time teachers (Tr. at 89).

25. Some District employees are given an "administrator's contract" of employment. These are for certain positions not in the bargaining unit, and not held by employees with certification. For instance, Kristen Graham was given an administrator's contract when she was employed as a media director for the 2000-2001 school year (B-10). Ms. Graham was not a certified librarian. If an employee holds a certification, they are generally given a standard teacher's contract.

26. The constitution of the Maine Education Association provides, in part, that membership is open to all persons actively engaged in the education profession or to persons interested in advancing the cause of public education (B-19).

DISCUSSION

Section 966(3) of the 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.

Chapter 11, § 6(3) of the Board Rules repeats these statutory requirements and further provides that a unit clarification

petition may be denied if the petition requests the clarification of unit placement questions which could have been but were not raised prior to the conclusion of negotiations which resulted in an agreement containing a bargaining unit description. The parties have stipulated that three of the four requirements of § 966(3) have been met: the Association is the certified bargaining agent for the certified personnel bargaining unit, the parties have been unable to reach agreement on the issue of whether part-time certified personnel should be part of the bargaining unit, and no question exists concerning representation. The employer has not argued that the petition should be dismissed due to failure to preserve the issue during the most recent collective bargaining negotiations. In fact, the stipulations entered into by the parties (stips nos. 7-9) describe the manner in which this issue was specifically raised by the Association but removed from the table as a permissive subject by demand of the employer. This petition was filed prior to the ratification of the 2004-2006 collective bargaining agreement.

The parties do not agree, however, whether the fourth requirement of § 966(3) is present in this matter; that is, whether the circumstances surrounding the formation of the bargaining unit have changed sufficiently to warrant modification of the unit. The requirement for changed circumstances is a "threshold question" in a unit clarification proceeding. MSAD No. 14 and East Grand Teachers Association, No. 83-A-09, at 7 (MLRB Aug. 24, 1983). "The petitioner in unit clarification proceedings bears the burden of alleging the requisite change and, further, of establishing the occurrence of said change in the unit then at issue." State of Maine and MSEA, No. 82-A-02, at 16 (MLRB June 2, 1983) (Interim Order).

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). Likewise, change of duties in a particular job classification since the formation of the bargaining unit may satisfy the changed circumstances threshold, particularly if those changes in duties result in the employee becoming excluded from the definition of a "public employee" under the relevant state labor relations law. State of Maine and MSEA, No. 91-UC-04, at 13-14 (MLRB Apr. 17, 1991). Such a change in duties may result in the removal of only one employee from the unit, not an entire classification, as when one employee begins to perform confidential duties. Lincoln Sanitary District and Teamsters Union Local 340, 92-UC-02, at 11-12 (MLRB Nov. 17, 1992). The Board and hearing examiners have found changed circumstances in a wide variety of unique circumstances, including others discussed more fully later in this report. See, e.g. City of Bath and Council 74, AFSCME, No. 81-A-01 (MLRB Dec. 15, 1980) (a change in the employer's organizational structure is sufficient to establish changed circumstances); Town of Kittery and Teamsters Local Union 340, No. 91-UC-12 (Feb. 4, 1991) (a change in bargaining agent through decertification/bargaining agent election is sufficient to establish changed circumstances).

Whether or not the Association has established "changed circumstances" in this matter is, indeed, a central question of this case. The Association has presented several arguments on this question. In the petition, the Association offered the following information regarding the changes alleged to have occurred since the formation of the bargaining unit:

> The parties began negotiations on a successor contract in June, 2004. The Association proposed the deletion of the word "full-time" from the Recognition Clause. During the summer of 2004, the full-time Librarian position - a part of the bargaining unit - was reduced to a part-time, non-bargaining unit position entitled

"Library Consultant."

> In March, 2005, the parties were in mediation on the successor contract when the Board demanded that the Association withdraw the issue of "part-time" positions being included in the bargaining unit because it was a permissive subject of bargaining.

In the oral closing argument presented at the hearing in this matter, the Association argued that the employer's recent employment of part-time positions (positions held by Peggy Carson, Melissa Arndt, and Janice Cyr), and the employer's announced plans, due to budget constraints, to either reduce full-time positions to part-time, or to hire part-time positions, constituted changed circumstances (Tr. at 96-97). Finally, in written closing argument, the Association argued as follows:

> Although the typical Unit Clarification revolves around an employer's creation of a new position - one kind of "change in circumstances" - this case is somewhat different. Here, the changed circumstances was an adjustment of the law never memorialized in either the CBA's Recognition Clause or a revised MLRB Form 1. When the second Form 1 was written in 1974, part-time teachers were not permitted to be "public employees," let alone members of a bargaining unit. The part-timers were excluded by law, not "simply by choice." Even had they not been so excluded, the parties' behavior since 1971 and 1974 toward part-time teachers has changed. That the parties have traditionally included part-timers on administratively-produced seniority lists and AATA Membership rosters - despite the contract language to the contrary - is important evidence of the mutual acknowledgment of a change, if not the formal documentation of one.

(Association Brief at 6, footnotes omitted).

In short, the Association has made several different arguments regarding the existence of changed circumstances. At least one of those arguments can be rejected without much further discussion. As the employer clearly established in its brief, the original exclusion of part-time employees from the definition

of "public employees" in the MPELRL was of brief legislative duration in 1969, and preceded the formation of this bargaining unit in 1971.[1] Since this unit was created, part-time employees could have been included in the bargaining unit (i.e., there was no statutory basis for excluding such employees). Therefore, that statutory change could not support a finding of changed circumstances since the formation of the unit.

The "formation of the unit" here consisted of the filing of two Agreements on Bargaining Unit, one in 1971 and one in 1974. Both parties argued about the significance of the wording of the 1974 Agreement (stating, explicitly, that the unit consisted of *full-time* certified personnel), but the hearing examiner cannot conclude much from this change that would assist in resolving the issue presented here. There was simply no evidence that part-time certified personnel were employed by the employer in 1971. Without the proof that part-time personnel were employed or were an issue to the parties, the lack of the use of the term "full-time" in the 1971 Agreement cannot be given undue significance now–-it might have been an oversight, or simply a matter of no importance to the parties at the time. In addition, the 1974 Agreement was filed by the parties following a Petition for Unit Determination filed by the employer that was in no way connected to the issue of part-time personnel; the 1974 Agreement appeared, from Board records, to be the amicable resolution of that petition. For purposes of determining the “circumstances surrounding” the formation of this unit, the issue of part-time personnel appeared to have been a non-issue to the parties in the early years of the bargaining unit. That has obviously changed in recent years, however.

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[1]Exhibits A and B attached to the employer’s brief show that part-time employees were excluded from the definition of “public employee” in the MPELRL when it was first enacted in 1969, but the exclusion was deleted by emergency legislation in that same year.

The Association also argues that another change of circumstances since the formation of the unit is the employer's present use of part-time teachers or other certified personnel or, at least, increased use of part-time personnel in recent years. This argument requires a close factual review of the record, which establishes the following:

- There was one teacher (Ms. Caron, the present superintendent's wife) who was employed around 1993 for a year or two on a slightly less than full-time basis (six-sevenths or five-sevenths time);[2]
- There was a teacher (Ms. Carson) employed for two years (2001-2002, 2002-2003), on a half-time basis;
- There was a media specialist (Ms. Arndt) employed for the 2004-2005 school year on a half-time basis, until she resigned mid-year;
- None of the above employees were employed by the District at the time this petition was filed or thereafter;
- There is a speech/language pathologist (Ms. Cyr) who has worked for the District for many years, who works three days per week but receives a salary equivalent to a full-time teacher.

It is important to note that the District argued that both Ms. Arndt (in her last, part-time year of employment) and Ms. Cyr (currently, as a part-time employed speech/language pathologist)

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[2]The superintendent also testified that he believed that there was, prior to his employment, another teacher who was employed to teach Spanish one period per day. There was little else presented upon which to base a finding of fact regarding this teacher. Furthermore, it is not clear that the Association is seeking to include all part-time teachers, even those who only work a few hours per week. Despite this paucity of evidence, the District argued that there has been a "practice" of creating part-time positions and employing part-time teachers by the employer (employer's brief at 7). The hearing examiner is mindful that the Association had the burden here to establish changed circumstances. On the other hand, the employer had full access to its own records of employment and, if there was any history of hiring part-time teachers, the employer was in the best position to provide evidence of that - but did not. If there was such a "practice," it has only occurred in the last few years, based on the evidence presented.

were not "certified" personnel in the manner that term is used in determining what positions are in the bargaining unit. This is an important point because non-certified personnel are simply not in the bargaining unit. If neither Ms. Arndt nor Ms. Cyr were certified employees, then the only recently-employed part-time certified employee was Ms. Carson, who was last employed about two years before the petition was filed. While it is possible that Ms. Cyr was and is a "certified personnel" employed on a part-time basis, the testimony presented on the point of the meaning of “certified” was conflicting and confusing. As the Association had the burden of showing changed circumstances, and the Association knew that the only part-time employee employed at the time this petition was filed and thereafter was Ms. Cyr, the hearing officer will not wade through this confusion and give the Association the evidentiary "benefit of the doubt" on this important point. Without this, the employment of Ms. Carson on a part-time basis over two years ago, with no clear evidence that this will be a recurring event, is simply insufficient to establish changed circumstances surrounding the formation of the bargaining unit. Cf. MSAD No. 14 and East Grand Teachers Ass’n, No. 83-A-09, at 8-10 (MLRB Aug. 24, 1983) (decisions regarding bargaining unit configuration can only be based upon present duties, not a projection of future duties).

The hearing examiner does, however, find the existence of changed circumstances in another area: the employer’s recent, clear and unequivocal position that part-time certified personnel are not in the bargaining unit (most obviously expressed in the last contract negotiations). This is a change because, prior to the last contract negotiations, the status of part-time certified employees was far from clear. The Association assumed that part-time teachers were in the unit, and the employer’s actions in this regard were inconsistent enough to warrant the Association’s assumption. The employer’s inconsistent actions fell into three

categories.

First, part-time certified personnel sometimes appeared on the seniority list and sometimes did not. The seniority list clearly had significance under the collective bargaining agreement (the agreement provides that the employer is to create the list yearly; various rights in the agreement are connected to seniority). There is no question that the seniority list is to contain bargaining unit members, and not other District employees, and therefore signifies the group of employees deemed to be in the bargaining unit by the employer. Despite this, part-time employees were sometimes on the list and sometimes were not: Ms. Carson and Ms. Arndt (in her last year of employment, when she was part-time) were not on seniority lists. Ms. Caron and Ms. Cyr were on seniority lists.

Second, the District sometimes deducted Association dues from the salary of part-time certified personnel who indicated a desire to belong to the Association, and sometimes did not. While it is true that, technically, anyone "interested in the cause of advancing public education" can become a member of MEA (B-20), the practice in the District was to deduct Association dues from those bargaining unit employees who elected to join the Association. The District deducted dues from Ms. Carson and Ms. Cyr (until she elected not to pay dues) even though both employees worked on a part-time basis. The District then refused to deduct dues from Ms. Arndt shortly after she began working on a part-time basis, even though she elected to have dues deducted throughout her previous two years of full-time employment.

Third, the District gave part-time teachers and other employees the same types of employment contracts and salary notifications as it gave to full-time employees who were clearly in the bargaining unit. For instance, Ms. Carson was given the same standard probationary teacher’s contract for both years of her part-time employment as full-time teachers were given. Ms.

Cyr, a part-time employee who the District maintains is not certified within the meaning of the CBA, was given the same notification of annual salary rate as full-time non-probationary teachers were given. The language and references in this latter notification gave the clear impression that Ms. Cyr was in the bargaining unit and that her salary was established pursuant to the terms of the CBA. The employer offered these standard teacher contracts to Ms. Carson and Ms. Cyr despite the fact that they offered "administrator's contracts" and "employment stipulations" to other employees they maintained were not in the bargaining unit.

By listing these inconsistencies, the hearing examiner is making no finding about whether part-time certified personnel were actually in the bargaining unit, despite the language of the recognition clause of the CBA. Under some circumstances, consistent practice can be evidence of a mutual agreement to amend a contract. See Paul Coulombe, et al., and City of South Portland, No. 86-11, at 16-17 (MLRB Dec. 29, 1986) (actual duties performed inconsistent with duties article). But that is not the issue presented here, nor does the hearing examiner have jurisdiction to make a finding on this issue. The inconsistent actions are simply listed to contrast these ambiguous actions with the District's present clearly-expressed and unequivocal position that it does not consider part-time certified personnel to be in the unit. The District's position was made completely clear during the negotiations for the 2004-2006 collective bargaining agreement (ratified in April, 2005) that it would not include or consider part-time certified personnel to be part of the bargaining unit. As stipulated by the parties, the Association proposed during these negotiations a change to the recognition clause to include part-time employees, and the employer demanded the removal of the proposal as a permissive subject. Through these recent negotiations, through the

District's response to the Association's petition, and through the District's arguments here, the Association can no longer be in any doubt of the District's position on this issue. It is this new and clearly-expressed position which constitutes changed circumstances here.

While this may not be a "typical" case of changed circumstances, the hearing examiner finds support for this determination in MLRB precedent. First and foremost, the Board has found a remedy in the unit clarification process where it appears that the petitioning party may be left with no other remedy. For instance, in AFSCME Council 93 and State of Maine, No. 89-UC-07 (MLRB Aug. 10, 1990), aff'd, No. 91-UCA-02 (MLRB Feb. 12, 1991), aff'd sub nom Bureau of Employee Relations and MLRB, 611 A. 2d 59 (Me. 1992), the hearing examiner considered the state's growing use of a "floating labor pool" of mental health workers who were eventually offered permanent employment, but without credit for time spent in non-permanent employment status, thus delaying the date on which the employees attained bargaining unit status. Because this pool of employees was constantly changing, but the dispute was a recurring one, a unit determination (even if timely filed) was found to be impracticable and a case-by-case determination found to be a "procedural nightmare." No. 89-UC-07, at 27. The hearing examiner found sufficient changed circumstances to allow the matter to proceed as a unit clarification, but also stated that the Board is empowered and required to resolve disputes over unit placement, even if the matter cannot meet the requirements of a unit determination or a unit clarification; otherwise, the parties would be left without a remedy. No. 89-UC-07 at 31. In Thomaston and Teamsters Local Union 340, No. 90-UC-03 (MLRB Aug. 30, 1989), the hearing examiner addressed whether the employer could petition for the removal of a position per statutory exclusion, when that position had existed since the inception of the unit and had remained in the unit by

agreement of the parties. Noting that neither a unit clarification nor a unit determination were appropriate upon the facts presented, the hearing examiner nevertheless suggested that where the employer had voluntarily granted bargaining unit status to a non-public employee, and the bargaining agent would not agree to removal, an employer's change of mind might be a change sufficient to satisfy § 966(3), if the issue was raised and preserved in negotiations; otherwise, the employer would be left with nothing other than a "self-help remedy." No. 90-UC-03, at 14.

The present case presents a similar dilemma. While agreement of the parties is certainly the preferred method of determining unit composition, the employer cannot be forced to agree to add part-time positions to the bargaining unit as part of negotiations (as the District has demonstrated). How, then, may the Association have a determination whether part-time teachers belong in the same bargaining unit as full-time teachers? The District has urged that the Association only be allowed to proceed by filing a unit determination, with accompanying showing of interest. This might be a logical way to proceed, but only if part-time certified personnel happen to be employed during the window period of the contract, or after expiration. Arguably, this has not happened in recent years despite some employment of part-time teachers, and may or may not happen in the future[3]. The District has also argued that <u>even if</u> a part-time certified teacher were to be employed by the District, this would be a change of "degree" only, and still not sufficient to support a finding of changed circumstances, so eliminating the possibility of this matter

[3]This was another area where the District's inconsistent treatment of part-time personnel in the past was important. If the Association had been aware that the District did not consider Ms. Carson--an employee both parties agreed was a part-time certified teacher in the 2001-2002 and 2002-2003 school years--to be in the bargaining unit, it may have proceeded differently, such as by attempting to secure a showing of interest from her and filing a unit determination petition.

proceeding as a unit clarification (employer's brief at 7-8). By finding changed circumstances here in the District's declared stance that part-time certified personnel are not in the unit, the Association will have the opportunity to have the issue of bargaining unit placement addressed in the event that a part-time teacher is employed in the future and the parties cannot agree to unit placement.

AFSCME and State of Maine, supra, provides support for a finding of changed circumstances here in another way. In AFSCME, the hearing examiner found that the state's increased use of the "floating labor pool" was a changed circumstance, but also found that the receipt by the union of monthly hire/termination reports (which alerted the union to the use of the pool) was a separate factor supporting a finding of changed circumstances. No. 89-UC-07 at 30. Similarly here, the District's clear and unequivocal stance regarding part-time personnel is new information to the Association. In AFSCME, it could not be determined when the new reporting information was first supplied to the union, other than at some point in time after the bargaining unit was created. Here, the District's stance during the most recent CBA negotiations was information that clearly arose since the formation of the unit.

In a "typical" unit clarification, after a finding that all the requirements of § 966(3) have been met, the hearing examiner usually addresses whether the positions at issue share a community of interest with the positions already 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 Bangor, No. 79-A-01, at 4 (MLRB Oct. 17, 1979). See also Board Rules Chapter 11, § 22(3). Because, as explained earlier in this report, the hearing examiner is unable to find that a part-time teacher or other certified employee is currently employed by the District, it would be premature to evaluate whether a community of interest exists. When and if the District employs a part-time teacher or other part-time certified employee in the future, the parties shall meet and negotiate whether a community of interest exists between the part-time position and those positions currently in the bargaining unit. Based upon the stipulations filed by the parties (stips nos. 16- 27), a community of interest will very likely exist if the position in question is a part-time teacher. Cf. Town of Berwick and Teamsters Local Union 48, No. 80-A-05 (MLRB July 24, 1980) (finding full-time and part-time police officers share a community of interest). Nevertheless, if the parties cannot agree about unit placement, either party may then petition the Board for a determination about the existence of a community of interest and unit placement. The hearing examiner also assumes that the Association will raise and preserve this issue in future CBA negotiations, if the matter has not been resolved at that time. This procedure is all in keeping with MLRB precedent that allows parties to return to the Board for a final determination in cases that are not otherwise procedurally ripe. See, e.g., Town of Thomaston and Teamsters Local Union 340, No. 90-UC-03 (employer may raise the issue of statutory exclusions in negotiations for next contract and, barring agreement, may return to the Board for determination); MSEA and State of Maine, Department of Inland Fisheries and Wildlife, No. 93-UC-05 (MLRB Sept. 29, 1993) (Interim Order) (by filing earlier unit clarification petition--which was dismissed on procedural grounds--the

union placed the employer on notice of intention to seek inclusion of position in the bargaining unit, and could pursue petition again after subsequent contract negotiations where issue preserved).

CONCLUSION

The Association's petition for unit clarification is granted, to the extent that the Association has established the elements found in § 966(3). When and if the District employs a part-time teacher or other certified employee in the future, the parties shall meet and negotiate whether a community of interest exists between the part-time position and those positions currently in the bargaining unit. If the parties cannot agree about unit placement, either party may then petition the Board for a determination about the existence of a community of interest and unit placement.

Dated at Augusta, Maine, this 19th day of October, 2005.

MAINE LABOR RELATIONS BOARD

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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.