STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 06-UCA-01
Issued: May 11, 2006

MSAD NO. 29 BOARD OF DIRECTORS, Appellant, and MSAD NO. 29 EDUCATION ASSOCIATION/ MEA/NEA, Appellee.	DECISION AND ORDER ON UNIT CLARIFICATION APPEAL

The MSAD No. 29 Board of Directors (the "Employer") filed this unit clarification appeal on January 9, 2006, pursuant to 26 M.R.S.A. §968(4) of the Municipal Public Employees Labor Relations Law (the "Act") and Chapter 11, §30 of the Rules and Procedures of the Maine Labor Relations Board ("Board"). The unit clarification report which is the subject of this appeal was issued on December 23, 2005, following an evidentiary hearing on the petition filed by the MSAD No. 29 Education Association/ MEA/NEA (the "Association") which sought to add the Certified Occupational Therapy Assistant ("COTA") position to the existing Educational Technician/School Secretary bargaining unit. See No. 05-UC-01. The hearing examiner concluded that the COTA position shares the requisite community of interest with the positions currently in the unit and should be added to the unit. The employer appeals that decision.

On appeal, both parties submitted written briefs, the last of which was received on April 10, 2006. The Board met to hear oral argument on April 25, 2006. Bruce W. Smith, Esq., represented MSAD No. 29, and Nancy E. Hudak, MEA UniServ Director, represented the Association. The Board deliberated this matter on April 25, 2006. After reviewing the decision below and the

record of evidence before the hearing examiner, and after considering the arguments presented by the parties, we affirm the decision of the hearing examiner.

JURISDICTION

MSAD No. 29 is an aggrieved party within the meaning of 26 M.R.S.A. §968(4), and the MSAD No. 29 Education Association is the bargaining agent within the meaning of 26 M.R.S.A. §962(2) for the Educational Technician/School Secretary bargaining unit at MSAD No. 29. The jurisdiction of the Maine Labor Relations Board to hear this appeal and to render a decision lies in 26 M.R.S.A. §968(4).

DISCUSSION

The standard of review for bargaining unit determinations by a hearing examiner is well established:

> We will overturn a hearing examiner's rulings and determinations if they are "unlawful, unreasonable, or lacking in any rational factual basis." Council 74, AFSCME and Teamsters Local 48, MLRB No. 84-A-04 at 10 (Apr. 25, 1984), quoting Teamsters Local 48 and City of Portland, [78-A-10] at 6 (Feb. 20, 1979). It thus is not proper for us to substitute our judgment for the hearing examiner's; our function is to review the facts to determine whether the hearing examiner's decisions are logical and are rationally supported by the evidence.

MSAD #43 and SAD #43 Teachers Assoc., No. 84-A-05, at 3 (May 30, 1984), affirming No. 84-UC-05. See also Topsham and Local S/89 District Lodge #4 IAMAW, No. 02-UCA-01 (Aug. 29, 2002), affirming No. 02-UC-01; aff'd No. AP-02-68, Ken. Cty. Sup. Ct. (March 20, 2003).

The Employer's primary argument in this appeal is that the hearing examiner made an error of law by failing to consider evidence of a clear and substantial conflict of interest between

the COTA and the existing bargaining unit positions. The Employer argues that this conflict is so compelling that it necessitates keeping the COTA out of the bargaining unit even if all eleven community-of-interest factors favor inclusion in the unit. The conflict allegedly arises because of the COTA's "unique ability to bargain for higher pay" due to her higher training, skills, and certification and due to the scarcity of trained Occupational Therapy Assistants in Aroostook County.

We have reviewed the record and the Unit Clarification Report and conclude that the hearing examiner gave appropriate consideration to all of the evidence in the record. Her conclusions were based on the evidence and were not unlawful or unreasonable. The hearing examiner made no legal error in rejecting as too speculative the Employer's arguments concerning how much more money the COTA could demand from other employers.[1] Likewise, her refusal to accept the Employer's dire predictions of what would occur at the bargaining table was neither unlawful nor unreasonable.

The Employer's argument that if there is a significant conflict of interest, the "community of interest factors must take a backseat to an examination of the conflict," is not supported by the law. In the Brewer decision quoted by the Employer, the Board observed that the objective of the community-of-interest analysis is to minimize conflicts of interests:

> 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.

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[1]She also noted "the COTA has not negotiated for herself any more advantageous terms than the union has negotiated for positions in the bargaining unit" and pointed out that it was undisputed that 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." Unit Clarification Report at 20.

AFSCME and City of Brewer, No. 79-A-01, at 4 (Oct. 4, 1979). This passage does not require that all potential conflicts be eliminated; it merely identifies and explains the desired outcome of minimizing potential conflicts of interest.

The Employer makes an additional legal claim that because the only person employed as a COTA does not want to be represented by the union, her position should not be included in the bargaining unit. To support this proposition, the Employer cites that part of section 966(2) that states:

> The executive director of the board . . . shall decide in each case whether, in order to insure to employees the fullest freedom in exercising the rights guaranteed by this chapter and in order to insure a clear and identifiable community of interest among employees concerned, the unit appropriate for purposes of collective bargaining shall be the public employer unit or any subdivision thereof.

Relying on this language, the Employer argues that the wishes of the incumbent should come within the scope of insuring "the fullest freedom" to employees. Section 966, however, deals only with how bargaining units are determined. The purpose of the quoted section of the law is to give direction to the Board's executive director on whether "the public employer unit" should be broken down into smaller parts when ruling on a unit determination petition. The guiding principles are the community-of-interest standard and ensuring to employees the "fullest freedom" in exercising the rights guaranteed by the Act. If the community of interest were the only issue to consider, the collective bargaining strength held by the group might be diminished by creating excessively small units. See UPIU and MSAD #33, No. 77-A-01, at 2 (Dec. 14, 1976) (Putting CETA employees in a separate unit would create unnecessary fragmentation which would deprive them "the fullest freedom in exercising the rights guaranteed" by the Act); and Me. Fed. of Nurses and Health

Professionals, AFT and Penobscot Valley Hospital, No. 85-UD-08, 5 (Dec. 7, 1984) (Under §966(2), a hearing examiner must establish units that "both insure employees 'the fullest freedom' in exercising their organizing and bargaining rights as well as a 'clear and identifiable' community of interest"), aff'd in relevant part, No. 85-A-01 (Feb. 6, 1985).[2]

The Employer's final two arguments, that the hearing examiner disregarded the public interest and that she misapplied the community-of-interest standard, are unavailing. We conclude that the hearing examiner's treatment of the public policy argument was entirely appropriate. With respect to the community-of-interest analysis, we have reviewed the hearing examiner's findings and conclusions and find no error in law or fact.

In sum, we have reviewed the record and the hearing examiner's decision and conclude that her legal analysis was sound in all respects. Furthermore, the hearing examiner's factual conclusions are logical and are rationally supported by the evidence. We conclude that the hearing examiner's determinations were not unlawful, unreasonable, or lacking in any rational factual basis. Pursuant to 26 M.R.S.A. § 968(4), we hereby deny the appeal and affirm the unit clarification report in its entirety.

ORDER

On the basis of the foregoing discussion and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. § 968(4), it is ORDERED:

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[2]The concept of insuring to employees the "fullest freedom" also extends to honoring their choice of bargaining agent. See Teamsters and Town of Kittery, No. 83-UD-04 (Nov. 5, 1982), aff'd No. 83-A-02 (Employees' choice of bargaining agent must be honored as exercising freedom guaranteed by Act regardless of employer's claim of conflict caused by supervisory unit being represented by same union that represents rank-and-file unit).

That the appeal of MSAD #29 Board of Directors filed on January 13, 2006, is denied and that the hearing examiner's December 23, 2005, unit clarification report is affirmed in its entirety.

Dated at Augusta, Maine, this 11th day of May, 2006.

MAINE LABOR RELATIONS BOARD

/s/_____
Jared S. des Rosiers
Alternate Chair

/s/_____
Karl Dornish, Jr.
Employer Representative

/s/_____
Robert L. Piccone
Alternate Employee Representative

The parties are advised of their right to week review of this decision and order by the Superior Court by filing a complaint pursuant to 26 M.R.S.A. §968(4) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.