STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 09-UD-09
Issued: May 6, 2009

SAD #49 EDUCATIONAL TECHNICIAN I ASSOCIATION/MEA/NEA, Petitioner, and MSAD #49 BOARD OF DIRECTORS, Respondent.	UNIT DETERMINATION REPORT

PROCEDURAL HISTORY

This unit determination proceeding was initiated on February 20, 2009, when Joan M. Morin, MEA UniServ Director, representing the SAD #49 Educational Technician I Association/ MEA/NEA ("Association"), filed a Petition for Unit Determination and Bargaining Agent Election with the Maine Labor Relations Board ("Board"). This Petition requested a determination that a unit consisting of Educational Technician I's employed by SAD #49 ("Employer") constituted an appropriate bargaining unit within the meaning of 26 MRSA § 966 and Chap. 11, § 22 of the Board Rules. The Employer filed a timely response to this Petition on March 9, 2009, by its attorney, Bruce W. Smith, Esq. In its response, the Employer objected to the proposed unit and, instead, proposed a unit consisting of all Educational Technician I's, II's, and III's employed by SAD #49 who are public employees within the meaning of 26 MRSA § 962(6), excluding all other employees of SAD #49.

Board staff made initial attempts to find a date for a unit determination hearing that was mutually convenient for the parties and their representatives, without success. By letter to the parties dated April 7, 2009, the hearing examiner advised the

parties that she proposed to resolve the unit determination matter without hearing (a copy of this letter is attached to this determination). She invited the parties to present legal argument on the dispute no later than April 20, 2009. The Employer requested an extension until April 24, 2009, which was granted. Both parties submitted an argument in a timely fashion.

UNCONTESTED FACTS

SAD #49 currently employs approximately 54 Educational Technician I's, 26 Educational Technician II's, and 9 Educational Technician III's. If the unit proposed by the Union is approved and a bargaining agent election held, the Union has petitioned that the name of the prospective bargaining agent on the ballot be: "SAD #49 Educational Technician I Association/MEA/NEA." A bargaining unit of Educational Technician II's has been recognized by the Employer since at least since 1991, and still exists today. The bargaining unit of Educational Technician II's was created by agreement. The initial collective bargaining agreement for the unit was ratified in 1991 for the period 1991-1993. The bargaining agent for the Educational Technician II's is the "MSAD #49 Educational Technicians/MEA/NEA." The Educational Technician III's are currently unrepresented.

JURISDICTION

The jurisdiction of the executive director or his designated examiner to hear this matter and make a determination lies in 26 MRSA § 966(1) and (2). The subsequent references in this Report are all to Title 26, Maine Revised Statutes Annotated, unless otherwise noted.

DISCUSSION

Section 966(1) of the MPELRL provides, in part:

> **3. Bargaining unit standards.** In the event of a dispute between the public employer and the employee or employees as to the appropriateness of a unit for purposes of collective bargaining . . . the executive director or his designee shall make the determination, except that anyone excepted from the definition of public employee under section 962 may not be included in a bargaining unit.

While the MPELRL empowers the executive director to conduct a hearing in order to make a unit determination, a hearing is not required to be conducted. Chap. 11, § 14 of the Board Rules makes clear that a unit hearing must be conducted only if necessary to resolve the dispute at issue. While the Employer here has presented thorough argument why the unit as proposed by the Union should be disapproved, the parties appear to be in agreement that this matter presents a dispute about legal issues only. In these unique circumstances, and based on Board precedent, I conclude that this matter can be resolved based only on the pleadings and the arguments presented by both parties.

The primary issue presented by this matter is straight-forward: if the bargaining unit petitioned for by the Union shares a community of interest, should a unit of different composition as proposed by the Employer be considered, or should the unit as petitioned for by the Union be approved? In the present matter, I conclude that the unit petitioned for by the Union should be approved without specific consideration of the alternative merged unit proposed by the Employer.

As the Law Court has recognized, there are two fundamental purposes of the MPELRL: to protect employees' right to self-organization and to promote the voluntary adjustment of their terms of employment. Lewiston Firefighters Ass'n, Local 785, IAFF v. City of Lewiston, 354 A.2d 154, 160 (Me. 1976). Coherent bargaining units with a clear and identifiable community of interest are essential to both these objectives.[1] The

[1]The oft-cited community of interest factors developed by the Board are found at Chap. 11, § 22(3) of the Board Rules.

requirement that the hearing examiner examine the extent of the community of interest was explained by the Board nearly 30 years ago, and is still valid today:

> Title 26 MRSA § 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 ... Such conflicts often complicate, delay and frustrate the bargaining process.

AFSCME and City of Brewer, No. 79-A-01, slip op. at 4 (MLRB Oct. 17, 1979). In determining unit compatibility, the statute clearly directs the examiner to insure the employees the *fullest freedom in exercising the rights* guaranteed by the MPELRL. § 966(2).

The Employer here readily acknowledges that the proposed unit of Educational Technician I's share a community of interest. The Employer argues, however, that the proposed unit is not appropriate because other positions that share a community of interest with the Educational Technician I's must be included: "It is simply not enough to say that the positions included in a unit determination share a community of interest, and stop there, without considering whether identical or nearly-identical positions are being excluded from the unit" (Employer's Argument, at 5). This ignores the facts of the present matter as the Educational Technician II's have not been "excluded" from the proposed unit; in fact, they have been organized as a separate unit by agreement of the parties for nearly 20 years. As to the Educational Technician III's (who are currently unrepresented), the Employer did not address what authority would allow the Board to add a different classification to a proposed unit with no showing of interest from the employees involved.[2]

[2]Mountain Valley Education Ass'n and MSAD #43, No. 94-UD-13 (MLRB

Whether the Educational Technician I's and II's share a community of interest is simply not a matter that the hearing examiner should address or consider in this case, based on long-standing Board precedent. It is well established that the hearing examiner's duty is to "determine whether the unit proposed by the petitioner is an appropriate one, not whether the proposed unit is the most appropriate unit." Town of Yarmouth and Teamsters Local Union No. 48, No. 84-A-04, slip op. at 4 (MLRB June 16, 1980)(emphasis supplied). In that case, the union petitioned for one unit and the employer responded that two units, based on divisional lines, would be more appropriate because two other units in the town were already based on divisional lines. Noting that each petition "must be judged on its own merits," the Board stated:

> Moreover, adoption of the Town's position that all bargaining units of Town employees must follow divisional lines would violate the employees' guaranteed right to full freedom in the exercise of their representational and bargaining rights.

Town of Yarmouth, supra, at 4. The employees' right to self-organization is best protected when their judgment on the appropriate unit is respected, as long as the positions share the community of interest required by § 966(2). See Portland Administrative Employee Ass'n and Portland Attending School Committee, No. 86-UD-14, aff'd, No. 87-A-03 (MLRB May 29, 1987) (examination of the bargaining unit proposed by the employer not

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Nov. 3, 1994)(group of employees in existing positions historically excluded by choice cannot be added to a bargaining unit without a sufficient showing of interest from the employees to be added). It is not clear whether the Employer has abandoned its position that an appropriate unit must consist of the Educational Technician I's, II's, and III's; the Employer only referenced Educational Technician I's and II's in its written argument. This highlights an inherent difficulty in the employer's position - where should the Board "draw the line" in creating an appropriate unit if it can reject the union's proposed bargaining unit that shares a community of interest?

proper until the bargaining unit proposed in the Union's petition has been considered and rejected).

The Employer has ably attempted to distinguish the numerous Board and examiner cases that follow the above precepts. It is true, for instance, that the Employer here is seeking to *merge* the proposed unit of Educational Technician I's with the existing unit of Education Technician II's; they are not seeking to *divide* the proposed bargaining unit into smaller units, perhaps along divisional or functional lines in the workplace, as was the case in Town of Yarmouth, supra, and in numerous examiner cases.[3] However, I do not believe these cases simply stand for the proposition that the Board favors bigger units because such units inherently maximize "bargaining power." Rather, these cases stand for the proposition that if a community of interest exists in the unit as proposed (and such factors as desires of the affected employees and the extent of union organization are some of the community of interest factors that must be considered), the employees "guaranteed right to full freedom in the exercise of their representational and bargaining rights" is best protected by approving that unit. Town of Yarmouth, supra, at 4. The Board and examiners have also considered cases in which the employer sought to place the union's proposed unit in an existing unit or units; the employer's proposed unit placement has only been considered if the union's proposed unit lacks community of interest. Cf., e.g., County of Cumberland and Teamsters Union Local 340, No. 07-UDA-01, slip op. at 4 (MLRB Jan. 16, 2007)

[3] Granite City Employees Ass'n and City of Hallowell, No. 01-UD-04 (MLRB May 23, 2001)(wall-to-wall municipal unit petitioned for and approved; employer's argument to create four separate bargaining units rejected); MSAD No. 48 Teachers Ass'n and MSAD No. 48, No. 97-UD-03 (MLRB Dec. 23, 1996)(wall-to-wall educational support unit petitioned for and approved; employer's argument to create two separate bargaining units rejected); East Grand Teachers Ass'n/MTA/NEA and MSAD No. 14 Board of Directors, No. 92-UD-01 (MLRB Oct. 1, 1991)(same).

(wherein the Board affirmed that the employees' guaranteed right to full freedom in the exercise of their representational and bargaining rights is best protected when the Board considers first the bargaining unit as proposed by the employees, only rejecting such if no community of interest is established); Portland Administrative Employee Ass'n, supra (placement of some employees in existing bargaining units considered only after the examiner found that a community of interest did not exist amongst all of employees in the unit proposed by the union). The issue here is not whether there has been a Board case that is factually identical to the present matter; the issue is whether any Board precedent supports the Employer's position. It does not. The Employer also argues that absurd "gerrymandered" bargaining units might result if the principle being followed here were followed too formulaically (for example, approving a bargaining unit with educational technicians in even-numbered grades only, etc.). The hearing examiner agrees that such examples would present a very different case than the one here, and would likely be treated differently. The case here-- approving a bargaining unit with a sizeable number of employees (50-60 employees) all in the same job classification, and rejecting the employer's proposed merging of these employees into a long-standing bargaining unit of fewer employees in a different job classification--is simply very different from the "absurd" bargaining units that the Employer has opined might be approved in the future.

The examiner will also address some other arguments raised by the Employer.

The Employer argues that the proposed bargaining unit will not "maximize the bargaining power" of the employees in the unit, perhaps a rather odd argument for an employer to present. While it is possible that a larger group of employees would have more bargaining power, it is also possible that the difficulties of

combining a large group of previously-unrepresented employees with a smaller group of long-represented employees in a different job classification would create dissension and lessen bargaining power. Such considerations are too speculative to rely upon in an initial unit determination.

The Employer also argues that the Educational Technician I's who signed the showing of interest cards did not indicate a preference to be placed in a separate bargaining unit of Educational Technician I's. That is a valid point, and one which highlights the fact that the MPELRL protects the rights of individual public employees to "join labor organizations of their own choosing and to be represented by such organizations in collective bargaining . . . ." § 961. Employees express these rights both through the signing of showing-of-interest/dues cards, and through voting in the election process. The Union here has represented via its petition that the proposed bargaining unit consists of Educational Technician I's, and has supplied the requisite 30 percent or more of showing-of-interest cards signed by employees employed in that classification only. An election can only be conducted after a bargaining unit has been established. If the Employer is correct here and the Educational Technician I's do not wish to be represented in their own bargaining unit or do not wish to be represented by the "SAD #49 Educational Technician I Association/MEA/NEA," then the Union will not prevail in the election.

The showing-of-interest cards signed by the Educational Technician I's also do not specifically support the Employer's position that these employees wish to be in a bargaining unit with the currently represented Educational Technician II's. Indeed, what the Employer argues for would be best accomplished by a merger election as contemplated by § 966(4) which would allow employees in both classifications the freedom to indicate

whether they wish to bargain together. Such a merger petition could be filed by either the Employer or by the Union, if in compliance with § 966(4).

Finally, the Employer argues that creating the bargaining unit of Educational Technician I's conflicts with the purposes and goals of the new Maine school consolidation law. 20-A MRSA §1451, et seq. The provision of this law regarding the merger of bargaining units in a regional school unit is not, of course, specifically implicated here as the student enrollment in SAD #49 is large enough that it has not been required to merge with other school administrative units. Even if it were, the law directs merged units to be structured "primarily on the basis of the existing pattern of organization, maintaining the grouping of employee classifications into bargaining units that existed prior to the creation of the regional school . . . ," a directive that does not necessarily equate to a "preference for consolidation into larger bargaining units" that "trumps employee freedom to choose" as the Employer argues. Even if "creation of cost-efficient organizational structures" [20-A MRSA § 1451(6)] were a criterion I could use in determining the unit here, it is not necessarily true that it would be more cost efficient to merge this large group of employees into a unit of employees in a different job classification that already has a lengthy bargaining history with the Employer. In short, the school consolidation law is simply not implicated here, and speculation about cost efficiencies would be inappropriate to this determination.

CONCLUSION

In conclusion, the parties are in agreement here that the Educational Technician I's share a community of interest. No compelling reasons were presented to look beyond this fact and to

merge this classification into a larger unit. In approving the unit as petitioned for by the Union, the hearing examiner relies particularly on Board precedent that strongly favors the rights of public employees to organize and to petition for a unit which they believe will best represent their bargaining needs.

ORDER

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 MRSA § 966, the following described unit is held to be appropriate for purposes of collective bargaining:

INCLUDED: Educational Technician I's employed by SAD #49.

EXCLUDED: All other employees of SAD #49.

An election for this unit shall be scheduled as soon as possible.

Dated at Augusta, Maine, this 6th day of May, 2009.

MAINE LABOR RELATIONS BOARD

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Dyan M. Dyttmer
Hearing Examiner

The parties are hereby advised of their right, pursuant to 26 MRSA § 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.