

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

BIG BAY DE NOC SCHOOL DISTRICT,
Public Employer,

Case No. UC03 B-04

-and-

BIG BAY DE NOC ESPA, MEA/NEA,
Petitioner-Labor Organization.

APPEARANCES:

Nantz, Litowich, Smith & Girard, P.C., by John H. Gretzinger, Esq., for the Employer

White, Schneider, Young & Chiodini, P.C., by Michael M. Shoudy, Esq., for Petitioner

**DECISION AND ORDER
ON PETITION FOR UNIT CLARIFICATION**

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was heard at Lansing, Michigan on June 13, 2003, before D. Lynn Morison, Administrative Law Judge for the Michigan Employment Relations Commission. Pursuant to Sections 13 and 14 of PERA, and based upon the entire record, including the transcript of the hearing and the briefs filed by the parties on or before August 21, 2003, the Commission finds as follows:

The Petition and Positions of the Parties:

In the petition filed on February 13, 2003, the Big Bay de Noc ESPA, MEA/NEA (Petitioner) seeks to clarify its bargaining unit of support staff by adding the classification entitled Discipline with Dignity (DWD) coordinator. Big Bay de Noc School District (Employer or District) admits that the newly created position of DWD coordinator has a community of interest with Petitioner's unit and could properly be included in the unit on that basis. However, the Employer asserts that Section 15(3)(h) of PERA bars the DWD coordinator from the unit because it created the position as a part of a pilot program. The Employer further argues that the DWD coordinator should be excluded from the bargaining unit because it is a temporary position. For the reasons set forth below, we hold that the DWD coordinator should be included in the bargaining unit represented by Petitioner.

Facts:

The Big Bay de Noc School District is housed in a single building with facilities for kindergarten through twelfth grade, as well as the District superintendent's office. Employees are organized into two bargaining units: the teachers' bargaining unit, and the support staff unit represented by Petitioner, which is composed of all full-time and regular part-time support staff, including office personnel, paraprofessionals, custodial maintenance employees, the maintenance head, food service employees, the head cook, transportation employees, and transportation heads. The unit specifically excludes the finance director, substitute employees, and other employees whose duties are fifty percent or more supervisory or administrative.

The Employer began developing the DWD Program in 2001 at the suggestion of its new superintendent Brian O'Hara. O'Hara estimates that approximately five percent of school districts nationwide are implementing a disciplinary program similar to the Employer's DWD Program. The DWD Program is designed to shift the District away from a punishment-oriented approach to discipline, such as detentions and suspensions, in order to teach children to be responsible for their own actions. Under this system, a student in the seventh through twelfth grades, who continues to misbehave after an initial intervention by his or her teacher, is sent to the Discipline with Dignity room. There, the DWD coordinator offers the student the option of sitting quietly, studying, or developing a plan to resolve the behavioral problem. Until the student develops a plan to resolve the problem, the student must report to the DWD room each day in lieu of the classroom from which he or she was sent.

The Employer sought grants to fund the DWD Program and began training its staff in the spring of 2002 in preparation for implementation of the program in the 2002-2003 academic year. The Employer obtained partial funding through a new grant from the Positive Behavior Support Group. Other funds were allocated from the District's yearly at-risk grant. The Employer placed newspaper advertisements for a DWD coordinator in August 2002. The newspaper advertisement for the position, which also serves as the DWD coordinator's job description, states, "It is expected that this will be a permanent position."

The Union learned of the new position when its Uniserv director saw the newspaper advertisement. The Employer hired Bruce Froelich in September 2002, and he began work as the DWD coordinator in October. Subsequently, the Union grieved the Employer's decision to place Froelich in the position instead of a recently laid off bargaining unit member who had also applied for the job.

Because O'Hara's office is located across the hall from the DWD classroom, he is able to observe the program's operations. He also receives feedback from parents, teachers, students, and administrators and informally evaluates the program. The school principal, Tom Watson, is the DWD coordinator's direct supervisor, and is in the process of formally evaluating the DWD Program to determine whether it has had the desired impact on student behavior. The DWD Committee, which was originally formed to

decide whether the DWD Program should be established, will be reconvened to evaluate its progress, determine how to improve the program, and whether to continue it.

At the end of the 2002-2003 school year, Froelich was informed that the Employer intended to continue the program the following school year and that he was the Employer's choice to continue in the position of DWD coordinator. As of the date of the hearing, the District's board had not decided whether to continue the program for the 2003-2004 school year. However, O'Hara intended to recommend to the board that the program continue, and the District had already applied for financial support for the program from various sources. O'Hara expected to know whether the DWD Program will become permanent after two years. In its post-hearing brief, the Employer notes that, after the hearing, the District did in fact approve the continuation of the program for the 2003-2004 school year.

Discussion and Conclusions of Law:

A unit clarification petition is appropriate to determine the bargaining unit status of a newly created position or a position that has undergone significant changes. *City of Detroit*, 1997 MERC Lab Op 454, 455; *City of Battle Creek*, 1994 MERC Lab Op 440, 447, *Genesee County*, 1978 MERC Lab Op 552, 556. As previously noted, the Employer concedes that the newly created DWD position shares the requisite community of interest to be included in the Union's bargaining unit.

However, the Employer argues that the DWD coordinator is not subject to a unit clarification petition because the position is a part of a pilot program under Section 15(3)(h) of PERA. Section 15(3)(h) states that collective bargaining shall not include "Decisions concerning [the] use of experimental or pilot programs and [the] staffing of experimental or pilot programs." We find this argument to be without merit. In *Essexville-Hampton Pub Schs*, 2001 MERC Lab Op 316, we stated that this section "does not apply to the unit placement issue...which is within the sole discretion of the Commission." *Id.* at 320.

The Employer also argues that the DWD coordinator cannot be properly included within the bargaining unit because the position is temporary. The determination of whether a position is temporary requires an examination of the nature of the employment relationship with respect to the continuity and expectancy of permanent and/or regularly scheduled ongoing employment. *Lansing Pub Schs*, 1993 MERC Lab Op 18, 22. See also, *Deckerville Community Schs*, 2000 MERC Lab Op 390, 394; *Chelsea School District*, 1994 MERC Lab Op 268, 275. As in the *Deckerville Community Schs* case, the fact that the position has already continued for several months, and the fact that it has no definite ending date, indicate that the position is not temporary. As of the close of the hearing, the District had employed the DWD coordinator for most of the 2002-2003 academic year. The position was subsequently approved to continue through the 2003-2004 academic year. Moreover, the newspaper advertisement for the position stated that Respondent expected the position to be permanent. Although the Employer had not made a final decision on the permanency of the DWD program or the DWD coordinator

position, there were no plans to terminate either the program or the position as of the time that the record closed. It is evident that the DWD coordinator has a substantial and continuing interest in employment. Accordingly, we find that the DWD coordinator should be included in Petitioner's bargaining unit. We, therefore, issue the following order:

ORDER CLARIFYING UNIT

Based upon the above findings and conclusions, the petition filed by the Big Bay de Noc ESPA, MEA/NEA, is hereby granted and the bargaining unit consisting of the support staff of Big Bay de Noc School District is clarified to include the position of the Discipline with Dignity coordinator.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Harry W. Bishop, Commission Member

Nino E. Green, Commission Member

Dated: _____