

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

In the Matter of:

MARQUETTE AREA PUBLIC SCHOOLS,
Public Employer,

Case No. UC08 C-008

-and-

MICHIGAN EDUCATION ASSOCIATION SUPPORT PERSONNEL ASSOCIATION
(MESPA UNIT II),
Labor Organization-Petitioner.

APPEARANCES:

Thrun Law Firm, by Donald Bonato, Esq., for the Public Employer

White, Schneider, Young and Chiodini, by William F. Young, Esq., for the Petitioner

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

Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, this case was heard at Lansing, Michigan on October 23, 2008, by Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission. Based on the entire record, including post-hearing briefs filed on December 8, 2008, we find as follows:

The Petition and Positions of the Parties:

The Michigan Education Support Personnel Association (MESPA) filed this unit clarification petition on March 4, 2008. Petitioner represents a unit of employees of the Marquette Area Public Schools consisting of all full-time and regularly scheduled part-time office clerical employees, instructional program aides, teachers' aides, special education aides, hall monitor aides and noon supervisors employed by the Employer. This unit is referred to by the parties as MESPA Unit II. Petitioner seeks to add the position of teacher assistant to this unit.

The Employer does not dispute that the position shares a community of interest with Petitioner's unit. However, it asserts that unit clarification is not appropriate because the position was created in the fall of 2006 and was neither new nor substantially changed when Petitioner first sought to include it in the MESPA II unit one and a half years later. The Employer argues that the teacher assistants cannot appropriately be included in Petitioner's unit

without a representation election. Petitioner asserts, however, that the position underwent significant changes in the fall of 2007. It maintains, therefore, that its petition is timely and that clarifying the unit to add the position is appropriate in this case.

Findings of Fact:

The Marquette Area Education Association (MAEA) which, like Petitioner, is affiliated with the Michigan Education Association (MEA), represents a bargaining unit of teachers and other certified and professional employees of the Employer, including psychologists and social workers. Petitioner represents two units, a unit of custodians, transportation employees and food service workers and the MESPA Unit II involved in this case. MESPA Unit II includes classroom aides and other paraprofessional employees.

Class size, especially in early elementary classrooms, has for some time been a topic of both concern and discussion between the Employer and the MAEA. Sometime in early 2006, the Employer told the MAEA that it had decided to initiate a one-year pilot program involving the creation of a part-time position, teacher assistant, to address this problem and to enhance language arts instruction in the early grades. At that time, most of the aides in the MESPA II unit were assigned to individual students with special needs as part of that student's individual education planning (IEP) agreement. The Employer had some classroom aides who were assigned to classrooms, rather than students. However, teachers had to give their classroom aides detailed daily assignments, and many felt that the classroom aides did not do much to alleviate the problem of extra students. The Employer told the MAEA that the teacher assistants were to be assigned to classrooms with regular teachers to participate in a program called "literacy intervention." At the beginning, teacher assistants would be assigned only to kindergarten classrooms. Stuart Skauge, then the MAEA president, understood from the Employer's communications with the MAEA that the Employer planned to hire certified teachers to fill the teacher assistant positions in anticipation that the teacher assistants could provide instruction that the classroom aides could not. However, the Employer also cautioned the MAEA that it could not be sure that it could find enough people with teaching certifications to fill these temporary, part-time positions.

In October 2006, the Employer posted the teacher assistant position as a part-time position in the MAEA unit. The posting indicated that the position was part of a pilot program to be in operation only for the 2006-2007 school year. It stated that each teaching assistant would be assigned to a specific kindergarten section to provide kindergarten teachers with qualified assistants to enhance the effectiveness of literacy instruction. The posting explained that teacher assistants were not to be assigned lunchroom, playground, or other student supervision duties. Eligible candidates for the position were required to have completed at least two years of study at an institution of higher education or an associate's degree, as well as experience working with young children. The posting noted that a bachelor's degree in elementary education was preferred.

In late November 2006, the MAEA and the Employer entered into a letter of agreement (LOA) covering terms and conditions of employment for the teacher assistant position. The LOA included a list of the preferred qualifications for the position, including a college degree in

elementary education. The agreement stated that except as specified, the teacher assistants would not be covered by the terms of the collective bargaining agreement between the Employer and the MAEA. The agreement also acknowledged that the position was a pilot position and that the teacher assistants would be hired on an at-will basis for the 2006-2007 school year.

In the spring of 2007, the MAEA and the Employer were bargaining over a successor collective bargaining agreement. The MAEA proposed to include the teacher assistant position in its recognition clause, while the Employer wanted the MAEA to sign another LOA with terms similar to 2006-2007 agreement. As the beginning of the 2007-2008 school year approached, the MAEA and the Employer had still not reached an agreement on the terms and conditions of employment for the teacher assistants.

On August 22, 2007, the Employer's school board passed a resolution approving an expanded teacher assistant pilot program to extend through the 2009-2010 school year. Under the new program, the fourteen teacher assistants would be placed in both first grade classrooms and kindergartens.¹

On September 27, 2007, the Employer posted a notice of vacancy for teacher assistants as a nonbargaining unit position. Unlike the 2006 posting, the second posting referred specifically to the teacher assistants as "instructional support" for the Employer's certified teachers. Specific reference to literacy instruction was removed, and the job posting no longer said that teacher assistants would not be assigned to student supervision. Like the October 2006 posting, the 2007 posting indicated that the position was part of a pilot program, this time to last through the 2009-2010 school year. The qualifications for the position listed in the posting were the same as in 2006. At least some of the teacher assistants hired in 2006 continued to work as teacher assistants in the 2007-2008 school year.

The only difference between the job responsibilities of the teacher assistants during the 2006-2007 school year and their responsibilities the following year was that in 2007-2008 some were assigned to first grade classrooms. The teacher assistants continued to be part-time, with hours that varied. They continued to work in classrooms alongside certified teachers. Despite the changes in the language of the job postings, the teacher assistants continued to instruct only in language arts, and they had no responsibilities for supervising students outside the classroom. For a short period in the middle of the 2007-2008 school year, the Employer hired part-time employees it called teacher assistants to tutor middle school students in math. However, these positions were paid for with special funds from the State of Michigan, and when these funds were exhausted the tutoring program was terminated.

The MAEA did not object when the Employer posted the teacher assistant position in September 2007 as a nonunit position. During the winter of 2007-2008, the MAEA and the Employer reached a collective bargaining agreement which made no mention of teacher assistants.

¹ Approximately seven more teacher assistants were hired for the 2008-2009 school year and placed in second grade classrooms.

Discussion and Conclusions of Law:

In *Lansing Sch Dist*, 20 MPER 3 (2007), we summarized the law pertaining to when unit clarification is appropriate:

Unit clarification is a proceeding for resolving disputes concerning the unit placement of newly-created positions and existing classifications that have undergone recent, substantial changes in their duties and responsibilities so as to create a real doubt as to whether the individuals in the classifications continue to fall within the category they occupied in the past. Unit clarification is not appropriate for upsetting an agreement, whether contractual or not, or an established practice regarding unit placement. *Wayne Co Risk Mgt Div*, 1996 MERC Lab Op 243; *Lansing Sch Dist*, 1994 MERC Lab Op 128; *Genesee Co*, 1978 MERC Lab Op 552, 556. We have consistently held that where an employee or group of employees have been historically excluded from an established bargaining unit, a question of representation is raised which can be resolved only through the filing of a proper petition for representation election accompanied by a prior showing of interest. See *Blackman Twp*, 1988 MERC Lab Op 419, and cases cited therein.

Unit clarification is generally not appropriate where there is an existing agreement between the parties concerning unit placement, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons, or the practice has become established by acquiescence and not by express consent. *Jackson Pub Sch*, 1997 MERC Lab Op 290; *Genesee Co*, 1978 MERC Lab Op 552.

We agree with the Employer that the teacher assistant position was created in 2006, and that there were no substantial changes in the duties and responsibilities of the position in the fall of 2007. However, we find no evidence that the parties had an agreement, either express or implied, to exclude the position from Petitioner's unit. We further find that the position was not "historically excluded" from MESPA Unit II.

The Employer created the teacher assistant position in the fall of 2006 as a position in the MAEA unit. The position did not require teacher certification, but, as the record indicates, the duties of and skills required for the position were arguably similar to those of employees represented by the MAEA. When an employer creates a new position, and two unions claim it, we have consistently held that we will defer to an employer's reasonable decision to place the position in one of their units if the evidence indicates that the position shares a community of interest with this unit or with both units. *Detroit Pub Sch*, 21 MPER 52 (2008) and 21 MPER 26 (2008); *City of Bay City*, 16 MPER 31 (2003); *Swartz Creek Cmty Sch*, 2001 MERC Lab Op 372; *City of Lansing*, 2000 MERC Lab Op 380; *Genesee Co (Friend of the Court)*, 1995 MERC Lab Op 223; *Henry Ford Cmty Coll*, 1996 MERC Lab Op 372. Since the Employer had clearly made a reasonable decision to place the teacher assistants in the MAEA unit, it would have been futile for Petitioner to file a unit clarification petition in 2006 seeking to challenge the Employer's unit placement. However, there is nothing in the record to indicate that Petitioner agreed that the position was appropriately excluded from its unit. In the fall of 2007, the

Employer removed the teacher assistants from the MAEA unit. The Employer does not dispute, and we agree with Petitioner's assertion, that the teacher assistants share a community of interest with MESPA Unit II. We find that unit clarification is appropriate in this case to add the position to Petitioner's unit, and that the petition filed on March 4, 2008, was timely. Accordingly, we issue the following order.

ORDER

Based upon the above findings of fact and conclusions of law, the petition filed by the Michigan Education Support Personnel Association is granted. Its bargaining unit, MESPA Unit II, is hereby clarified to include the position of teacher assistant.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____