

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

**IN THE MATTER OF FACT FINDING BETWEEN
WEST BABYLON UNION FREE SCHOOL DISTRICT**

-And

PERB Case No. M2017-043

CIVIL SERVICE EMPLOYEES ASSOCIATION (Para-Professional Unit)

-Before

Thomas Linden

REPRESENTATIVES

A. For the School District

Christopher Venator, Ingerman Smith L.L.P.

Yiendhy Farrelly, Superintendent

Michele Psarakis, Executive Director for Finance and Operations

Shawn Hanley, Assistant Superintendent for Human Resources

B. For the Union

Gretchen Penn, CSEA Labor Relations Specialist

Donna DiMuro, Secretary of the Local

PRELIMINARY STATEMENT

Fact finding is part of the statutorily mandated process of alternate dispute resolution found in the Taylor Law. It is, by its nature, an extension of the bargaining process and comes about only after the parties, for whatever reason, have been unsuccessful in the negotiation and mediation process. The sole reason for the existence of any of these extensions of the process is to bring the parties to an agreement. The undersigned believes it is the fact finder's responsibility to help the parties pay a visit to the other side's perspective, even though they may not fully agree with it.

DISTRICT AND UNIT PROFILE

The West Babylon Union Free School District (hereinafter, the "District") is a suburban public school district educating over 3,700 K-12 students. The District is comprised of seven school buildings, including a high school, a junior high school and five elementary schools. In addition, there is one transportation building. The District currently employs approximately 888 full and part-time employees. The District is one of the fifty-six component districts of Western Suffolk BOCES.

The bargaining unit is comprised of para-professionals, all of whom are part-time. Unit job titles include hall and cafeteria monitors, aides assigned to the cafeteria, playground, classroom, nurse, special education aides both one-to-one and two-to-one, and clerk typist.

BARGAINING HISTORY

The District and the Civil Service Employee’s Association (hereinafter, the “Union”) are parties to a collective bargaining agreement (hereinafter, the “CBA” or “Agreement”) covering the period July 1, 2014 to June 30, 2017, which, notwithstanding its expiration, remains in full force and effect pursuant to Section 209-a(1)(e) of the Taylor Law. In an effort to negotiate a successor agreement, the parties participated in five negotiation sessions from February 8, 2017 to June 6, 2017. After these negotiations failed to generate a new agreement, the Union and District filed a joint Declaration of Impasse with the Public Employment Relations Board (hereinafter, “PERB”) on June 9, 2017. Shortly thereafter, PERB appointed Ms. Karen Kenney as mediator. Despite three mediation sessions, no agreement was reached, and subsequently, the undersigned was appointed as fact finder by letter of January 17, 2018. A fact finding hearing was held at the District Office on March 6, 2018, at which time each party presented their case and submitted a brief. The record was then closed.

THE ISSUES

- Compensation
- Filling of open positions

COMPENSATION

District and Union Positions on Compensation

Currently, all employees in the unit are paid an hourly wage in accordance with a salary schedule enumerated in an attachment to the CBA. The District originally proposed to increase each of the four steps in the schedule by fifty-five (\$.55) cents per hour for a total of \$2.20 per

hour, for the agreed upon four years of the proposed CBA. The District was agreeing with the Union's initial salary proposal. After the Union rejected the District's proposal, the District upped the ante and offered a seventy (\$.70) cents per hour increase which add up to \$2.80 in total over the four years of the Agreement. The District notes in its brief that the Union's original proposals submitted in February, 2017 included the fifty-five (\$.55) cents per hour increase which the District increased to seventy (\$.70) cents per hour, plus increment. The District has tied any pay increase to the language change they proposed to the "open position" provision of the Agreement, namely Article II, Unit Rights, Section 2.2, the first sentence of which reads:

"Open positions within the unit shall be offered to qualified members of the unit in the schools of the district."

The District contends that final agreement on a new CBA depends on the outcome of the negotiations of this sentence.

The Union, on the other hand, while it would welcome an increase to salary schedule steps, is reluctant to agree to any expansion of this provision, believing it provides intra-unit transfer benefits that are extremely important to its members. Simply stated, it is the Union's position that it would accept the original proposal of the District "in exchange for the District to drop its 2.2 Open Positions proposal."

FILLING OF OPEN POSITIONS

District Position on Filling of Open Positions

The District points out that "there are several types of aides in the unit; which include, among others, "one-on-one aides, classroom aides, clerical aides, cafeteria aides and hall monitors." The District contends that there are "personal characteristics" that are important to each

position. The example is given of one-to-one special education aide, or a classroom aide assigned to a special education class who ideally would possess “a high degree of patience and particular demeanor to be successful in working with the District’s disabled children.”

The District argues that against this backdrop, the language of Article II, 2.2 places “significant limitations on the ability of the District to fill openings in these positions with appropriately suited candidates.” In an effort to expand the scope of this article, the District proposed the following:

“The first sentence of Article II, Paragraph 2.2 shall be amended to read as follows: ‘Open positions within the unit shall be offered to qualified members of the unit or qualified members of the substitute list in the schools of the District.’ ”

The main point in the District’s argument is that it does not have enough operational control over position filling due to the provisions of 2.2. It is required to fill openings with members of the unit instead of other candidates such as substitute para-professionals, irrespective of the suitability of the unit member to perform the job.

The District offers that the “primary instance where this plays out detrimentally to the District is in the hiring of a one-on-one or special class para-professional.” The District gives an example that a cafeteria aide or hall monitor with “no experience working with disabled children” and who “does not necessarily possess the demeanor and personality attributes that are critical to the assignment” should not be transferred to the open position just because they are in the bargaining unit. In this situation, the district would have to offer the position to the unit member even though the substitute who had been temporarily filling the position had proven satisfactory. In other words, even though this substitute had experience and proficiency working with highly disabled children, they would not retain the position. The District would feel the contractual

restraints of Article II, 2.2. because it would not be able to appoint the more qualified person to fill the position.

The District points out that many of the its para-professional positions are classified as one to one or two to one or special education, self-contained classroom positions. Students in these classes all have IEP's and require consistent guidance and support throughout the day, academically, socially and behaviorally. The District further indicates that some candidates who apply for para-professional positions possess teaching certificates, but the District is unable to hire them if a permanent para-professional in the unit applies for the position.

The District argues that when a unit member is put into a new position, a domino effect takes place with backfilling the vacated position. The District reports that last year it had a minimum of 18 internal transfers within the unit. At the hearing, the District claimed this year there were 12 transfers to date. While the District recognizes that the Association is reluctant to give up the benefits of the article in question, it believes that "reluctance should yield to the sound educational and operational interests of the District."

Union Position of Filling of Open Positions

The Union argues that the genesis of Article II, 2.2, was that in addition to looking at qualifications for filling of open positions, the District previously engaged in "favoritism and nepotism." The Union contends that it also believes the needs of a student are critical and, therefore, offered, during negotiations and mediation, to allow the District to circumvent the provisions of 2.2 up to three times per school year. The Union believes further, that to their

knowledge, this proposal would provide the District with enough breathing room to hire outside the unit.

The Union disagreed with the District's claim during bargaining that some aides now in one to one positions are there solely on the basis of seniority. The Union contends that "it is ultimately the responsibility of the District to maintain its employees, not the Union's." Furthermore, the Union argues, with respect to the domino effect claimed by the District, that no aide is moved until any or all positions are filled. The Union contends this practice creates continuity for the child and has been used without documented reproach for years."

Fact Finder Discussion and Recommendations Concerning Compensation and Filling of Open Positions

Teacher aides are classified employees, whose employment rights are governed by Civil Service Law. They are not subject to licensure and certification requirements under Education Law which states in Section 3009 (2)(a):

A teacher aide is appointed by a board of education to assist teachers "in the performance of their teaching functions by performing those non-teaching duties (emphasis added) otherwise performed by such regular teacher or teachers.

Commissioner's regulation, Section 80 – 5.6, Supplemental School Personnel, describes the duties of a teacher aide. They include:

- Managing records, materials and equipment;
- Attending to the physical needs of children; and
- Supervising students, and performing such other non-teaching duties which support teaching when such services are determined and supervised by the teacher.

From these descriptions we can deduce that all para-professionals are not alike and the adage that a “para is a para” is not entirely correct. Without getting into the details of various job descriptions of aides in this unit, it is intuitively obvious that different aide titles do different things. Hall monitors have different responsibilities than say, cafeteria, bus monitors or clerical aides.

In order to deduce the difference between responsibilities you have to ask, does the aide in question assist a teacher, either in the classroom or in some other setting? The above descriptions found in the law describe teacher aides in this unit including, one to one, two to one, and classroom aides. All other aides fall into a second category. Without getting too descriptive or prescriptive, the categories are significantly different in responsibilities and the fact finder believes they should be paid differently with teacher aides being paid more than other aides.

We are talking about core educational concepts here. It does not seem, however, that during bargaining at least, the differences in aide responsibilities have been discussed outside the context of Article II, 2.2. This has caused significant problems for both the District and the Union and both seem to be stuck as to what to do about this provision. It seems to the fact finder that the situation of transfers is at its core, rigid and inflexible because of the language of this article.

Within the unit, when a teacher aide position becomes open, there is migration only in one direction, from what I will call, Category 1 (cafeteria, hall monitor, bus monitor etc.), to Category 2 (one to one, two to one, classroom aide), and never the other way around. If the positions in Category 2 are the prime positions, often the target of transferees, would not this be, in fact, a type of de facto promotion in responsibility absent a pay increase. Even without an increase in pay, employees want to transfer to the teacher aide positions. These positions, of course, are not for everyone. For unit members who wish to participate more in the education process, however, these

transfers are intuitively more desirable. If Category 2 was paid more, the situation of intra unit movement would become one of promotion and not of transfer, as it is now.

It is my recommendation that the District establish job specifications and qualifications for each title in the bargaining unit, paying particular attention to the threshold qualifications that need to be met in order to be promoted to a position in Category 2. These qualifications would primarily be related to education, experience and interpersonal skills necessary to the position. This would allow the District to hire off of the substitute roster, hire a substitute currently performing the job or hire outside the bargaining unit should no one within the unit meet the qualifications.

This proposal would constitute a type of “career ladder” within the bargaining unit and it is my recommendation that appropriate training be offered to members of Category 1 who express an interest in promotion to Category 2. The details of this could be worked out by the labor management committee. A method to pre-qualify interested members could be developed as long as it did not inhibit the District from hiring outside the unit or substitutes already temporarily filling the position.

With respect to compensation, it is my recommendation that Category 2 members be paid \$1.00 more per hour at each step, starting in the third year of the agreement, on July 1, 2019. In addition, all unit members will receive a \$.55 cents hourly increase in the first two years of the agreement and \$.70 (seventy) cents in the last two years of the agreement. Longevity increases for the milestone 9 and 13 years will be \$.90 (ninety) cents per hour each. These hourly increases will be paid immediately after the ratification of the MOA by both parties. There will be no retroactivity.

Before the increase takes place for Category 2 employees on July 1, 2019 the District will be allowed to circumvent Article II, 2.2, eight (8) times per year, starting after the ratification of the MOA.

The fact finder has given the problems of this case a tremendous amount of thought, and the recommendations made, while they may seem outside of the original parameters of the impasse declaration, are creating a new road map. Solving the vexations of Article II, 2.2, will require the parties to do the work and not fall back on the constrictions inherent in the Article.

It is my hope that the recommendations provided will be a blueprint for success, and I urge the parties to give them some deep consideration.

Respectfully submitted.

Thomas J. Linden, Fact Finder

Bellport, New York

March 9, 2018

