

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of

SPRINGFIELD SCHOOL COMMITTEE

and

SPRINGFIELD FEDERATION OF
PARAPROFESSIONALS, LOCAL 4098
AFT, AFL-CIO

Case No. CAS-16-5059

Date Issued: August 1, 2017

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member

Appearances:

Maurice Cahillane, Esq. Representing the Springfield School Committee

Harold Jones, Esq. Representing Springfield Federation of
Paraprofessionals, Local 498

CERB DECISION

Summary

The issue in this unit clarification proceeding is whether to accrete a number of different tutor titles to a paraprofessionals bargaining unit. For the reasons set forth below, the Commonwealth Employment Relations Board (CERB) concludes that the tutors should be accreted to the unit.

Statement of the Case

On January 21, 2016, the Springfield Federation of Paraprofessionals Local 4098, AFT, AFL-CIO (Union) filed a unit clarification petition with the Department of Labor Relations (DLR) seeking to add the following titles to its bargaining unit of paraprofessional employees employed at the Springfield Public Schools (SPS): Academy Tutor, Academy Tutor (Part-time), Math Tutor, Math Fellow (Tutor), Math and ELA Tutor, ELA Tutor (collectively, the Tutors). The Union and the Springfield School Committee (School Committee or Employer) participated in an informal conference to discuss the issues raised by the petition on June 6, 2016. The parties submitted information, affidavits and position statements before and after the conference. On February 16, 2017, the DLR provided all parties with a summary of the information adduced during the investigation. Further, because it did not appear that there were any material facts in dispute, on February 16, 2017, the DLR requested the parties to show cause (Show Cause Notice) why it should not resolve the unit placement issue based on the summary of information from the investigation.¹ Both parties responded to the Show Cause Notice in a timely fashion. After reviewing the responses and supplementing certain facts, the CERB has determined that there are no materially disputed facts and decides this matter based on the following information.

¹ The CERB also requested additional information, which the parties provided and which has been incorporated into the facts set forth below.

1 Findings of Fact

2 Background

3 There are twelve different bargaining units in the Springfield Public School
4 system. These units include the paraprofessionals unit at issue here (Paraprofessionals
5 Unit); an administrators unit represented by the Springfield Administrators
6 Association/MTA (SEA) a teachers, librarians and psychologists unit represented by the
7 Springfield Education Association/MTA (SEA)² and a substitute teachers unit
8 represented by the United Food and Commercial Workers.³

9 Paraprofessional Unit – Description/History

10 On March 14, 1980, the CERB⁴ certified the Springfield Federation of Teachers,
11 Local 484, AFT-AFL-CIO in Case No. MCR-3019 as the exclusive representative of a
12 bargaining unit comprised of:

All teacher aides (City and Federal), library aides, reading aides, assistant
teacher aides, Chapter 766 aides, LPN aides, home-liaison workers, all
other aides, excluding volunteers, and all other school employees.⁵

13 Further, on July 1, 1999, in Case No. MCR-4741, the CERB certified the Union
14 as the exclusive bargaining representative of employees in a bargaining unit described
15 as follows:

² After the SEA was made aware of this petition, it notified the DLR that it did not represent the petitioned-for employees and disclaimed interest in representing them.

³ The other SPS bargaining units are: clerical, bus monitors, custodians, crossing guards, technical employees, security guards and tradesmen.

⁴ References to the CERB include the former Labor Relations Commission.

⁵ The CERB takes administrative notice of the certification in Case No. MCR-3019.

1 All teacher aides (City and Federal), library aides, reading aides, assistant
2 teachers, LPN aides, health assistants (LPNs) and other categories of
3 aides, but excluding volunteers, all managerial, confidential and casual
4 employees and all other Springfield Public School employees.⁶
5

6 In 2002, the CERB, pursuant to a unit clarification petition filed by the Union,⁷ accreted
7 the titles of physical therapist assistant (PTA) and occupational therapist assistant
8 (OTA) to this unit. Springfield School Committee, 29 MLC 106, CAS-02-3516, CAS-02-
9 3522 (November 29, 2002).

10 Since 2002, the School Committee and the Union have been parties to a series
11 of collective bargaining agreements, including one covering the period of July 1, 2014 -
12 June 30, 2016 (CBA). Article I of the CBA, "Federation Recognition and Definitions,"
13 states in pertinent part:

14 A. *Federation Recognition*
15

16 The Springfield School Committee recognizes the Springfield Federation
17 of Paraprofessionals, Local 4098, American Federation of Teachers, AFL-
18 CIO, as the exclusive bargaining agent and representative of
19 Paraprofessional employees of the Springfield Public Schools for the
20 purpose of collective bargaining with respect to hours, wages, and
21 conditions of employment. Such unit shall include Paraprofessionals,
22 CNA's, LPN's, Health Assistants, Assistant Teachers and Occupational
23 and Physical Therapist Assistants (OTA/PTA).
24

25 B. *Definitions*
26

⁶ The CERB takes administrative notice of the certification in Case No. MCR-4741 and has added information about this certification for the sake of completeness.

⁷ The SEA originally filed a unit clarification petition (Case No. CAS-02-3516) seeking to accrete the OTA and PTA titles, as well as the titles of Physical Therapist and Occupational Therapist. After the DLR notified the Union of the petition, the Union filed Case No. CAS-02-3522 seeking to accrete the OTAs and PTAs, and the two petitions were consolidated for investigation. Springfield School Committee, 29 MLC at 107.

1 The term "paraprofessional" and the term "person" as used in this
2 Agreement means a person employed by the Committee in the bargaining
3 unit as described in Section A of Article I.
4

5 **The Tutors**

6
7 Employment/Bargaining History
8

9 Tutors performing similar duties to those described below have worked in the
10 Springfield Public Schools since at least 2013. Before the 2015-2016 school year,
11 however, those tutors were employed and paid by the Springfield School Volunteers
12 (SSV), a non-profit organization that is a separate entity from the SPS, with separate
13 funding sources and its own board of directors and officers. On June 11, 2015, the
14 School Committee voted to make the Tutors employees of the Springfield Public
15 Schools. The Union did not seek to represent or bargain over any tutoring positions
16 when they were employed by the SSV.

17 On May 28, 2015, the Union was told by an unidentified tutor that the Tutors
18 would become SPS employees in the 2015-2016 school year, which began at the end
19 of August 2015.

20 In November 2015, the Employer posted openings for the following positions on
21 the SchoolSpring.com website: Academy Tutor High School Science Tech,⁸ Duggan-
22 Middle School Math and ELA Tutors – Empowerment Zone Schools (part-time);⁹ and

⁸ There were separate, but otherwise identical postings for part-time and full-time Academy tutor positions. The full-time posting indicated five positions were available; the part-time posting indicated that one position was available.

⁹ The Empowerment Zone consists of nine middle schools in the Springfield Public schools that the Department of Elementary and Secondary Education (DESE) deemed underperforming in accordance with M.G.L. c. 69, §1J. Pursuant to a January 8, 2015 Memorandum of Understanding with the School Committee, DESE and the Springfield

1 Math Fellows (Tutors). The Employer re-posted the Math Fellows posting on December
2 29, 2015. Both the November and December postings indicated that twenty-five Math
3 Fellow positions were available.

4 On January 5, 2016, Caryn Laflamme, an AFT Massachusetts Field
5 Representative, sent the following demand to bargain to Superintendent of School
6 Daniel J. Warwick:

7 On or around August 17, 2015, the Springfield Public Schools hired
8 employees to titles [sic] including Academy, Math, and Science fellows
9 (tutors). The Union believes these employees are members of the
10 bargaining unit. Therefore, the Union demands to bargain over where
11 they should be placed on our pay scale and other matters related to their
12 inclusion into the collective bargaining agreement.
13

14 Please contact me at your earliest convenience so that we may begin this
15 process.

16 The Employer refused to bargain and the Union filed this CAS petition a few weeks
17 later.

18 As of July 2016, the School Committee employed approximately eighty-three
19 Tutors throughout the SPS, including at Empowerment Zone schools, the Putnam
20 Vocational Tech Academy, the Springfield Renaissance School, the Conservatory of the
21 Arts and in a number of middle schools and high schools. The Tutors' duties,
22 qualifications and terms and conditions of employment are set forth below.
23
24

Empowerment Zone Partnership, Inc. (SEZP), the Superintendent selected and appointed SEZP to have full managerial and operation control of the underperforming middle schools. Unlike the SEA, the Union did not enter into a separate collective bargaining agreement with the School Committee on behalf of bargaining unit members who worked in Empowerment Zone schools.

Duties

In general, the Tutors perform traditional tutoring duties of providing additional academic support for individuals and small groups of students. The job postings for the Academy Tutor, Academy Tutor (part-time), Middle School Math and ELA Tutors, and Math Fellows (Tutors) all contain the following summary and description of duties:

SUMMARY: [Job Title] will instruct students daily in small group settings to supplement and enhance traditional in-class instruction. Tutors will prepare tutoring plans in accordance with a set program curriculum as dictated by the individual needs of each student. Tutors will coordinate with the campus-level Tutor Coordinator, classroom teachers, and school administration, to maximize student achievement. Tutors will maintain contact with parents and guardians, working along with the classroom teacher and school administration to foster the relationship between home and school that is an important part of student success.

DUTIES:

1. Carries out all the responsibilities of an academic tutor and assists students in the development of advanced learning skills in a variety of progressively complex academic areas as well as reinforces students' ability in necessary subject-specific basic skills.
2. Observes, monitors, and assesses students' performance often and records data to track student performance. Modifies instruction based on student assessment results.
3. Prepares instructional activities that aid in mastering specific academic skills, including subject matter content and state-mandated and end-of-course assessments. Instructs and monitors students in appropriate use and care of all materials and equipment to prevent injuries and damage.
4. Presents subject matter to students using a variety of research-based instructional strategies centered on students' individual needs.
5. Assists students in setting and reaching individualized academic goals and operates as a mentor to students in scholastic pursuits.
6. Actively collaborates with all stakeholders and participates in professional development activities necessary to successfully carry out job-related duties as assigned.
7. Enforces school/district policies and rules governing students as related to behavior management. Maintains confidentiality of student information as required by law and district policies.
8. May provide occasional job-related guidance, technical advice and training to other Fellows as needed.

1 9. Communication required such as receiving instructions and collaborating with
2 team members.

3 10. Interacts with students, tutor supervisor, other tutors and school
4 administration.

5 11. Outside communication may be required, particularly with parents.

6 12. Performs other job-related duties as assigned.

7 Math Tutors perform weekly assessments and, like teachers, get a daily
8 preparation period, at which time they can check in with the student or classroom
9 teacher to discuss a student's progress.

10 There is no evidence that the Tutors have any of the physical duties
11 paraprofessionals have, as described below. Further, although they work with some
12 students with special needs or Individualized Education Plans (IEPs), their assignments
13 are driven by the students' testing results, and not by whether the students have special
14 needs or are on an IEP. For the most part, the Tutors work outside the classroom but
15 occasionally work inside the classroom.¹⁰

16 Qualifications

17 The postings reflect that, in non-Empowerment Zone schools, the Tutors are
18 required to have a minimum of an Associate's degree from an accredited college or
19 university, with a Bachelor's degree preferred. Experience working with students in an
20 educational setting or related experience is required. The Tutors must also pass a
21 subject specific assessment test. Math Fellows must pass a district-based assessment.

¹⁰ The Union provided an affidavit from Kim Thompson (Thompson), an English Language Arts paraprofessional. Thompson indicated that she had observed Tutors working in the classroom and working one-on-one with students in the classroom. Although the Employer refuted this at the informal conference, it also presented evidence showing that the tutoring program has been piloting collaborative programs in which the Math Tutors are in the classroom when the classroom teacher is teaching math.

1 The Empowerment Zone Tutor postings contain the same educational
2 requirements, but unlike the Tutors' postings, prior experience in an educational setting
3 or related experience is not required. Rather, experience in an urban setting and
4 bilingual (Spanish) speaking, writing and reading skills are "highly desired."¹¹

5 Hiring/Supervision/Evaluation

6 Bonnie Osgood (Osgood), Senior Administrator for Tutoring, is responsible for
7 hiring the Tutors in non-Empowerment Zone Schools. The Tutors do not sign individual
8 employment contracts and the School Committee considers them to be at-will
9 employees. Upon accepting an offer of employment, the Tutors must undergo
10 fingerprinting, a CORI check, and sign off on New Hire paperwork, including payroll and
11 insurance information, and various school policies, e.g., anti-harassment, bullying
12 prevention, social media guidelines, etc.

13 Once they start working, the Tutors report to Osgood and a Tutor Site
14 Coordinator. Both Osgood and the site coordinator create lesson plans and curriculums
15 that the Tutors are expected to follow.¹² The Math Lab Tutors are assigned for the
16 school year and work with between one and three students. Academy Tutors who work

¹¹ The School Committee does not contend that the Tutors are professional employees within the meaning of Section 1 of M.G.L. c. 150E.

¹² Neither Osgood nor the Site Coordinator is in the Union's bargaining unit. Both positions existed before the Tutors became SPS employees. According to an undated job description that the Employer provided, the Site Coordinator position requires a Bachelor's degree, with a Master's degree preferred and at least five years of experience in a teacher leadership position. According to a posting for the Senior Administrator for Tutoring, the position requires a Master's degree in education with an advanced degree preferred and a minimum of five years' experience in administration in an educational setting.

1 in the High School of Science and Technology can, but do not necessarily, work with
2 the same child every day, but are available in the event a teacher identifies a student
3 who needs additional academic support. Tutors in the Empowerment Zone work with
4 one to five children. The students are selected for tutoring by the principal, assistant
5 principal and central office based on their test scores, but the Site Coordinator and
6 Osgood assign the Tutors to the students.

7 The Tutors in the Empowerment Zone are hired by and report to the school
8 principal, except at the Science and Technology High School, where some Tutors report
9 to Osgood and some report to the High School principal.

10 The Tutors are evaluated at the end of the year by their supervisors according to
11 a rubric that scores the Tutors on the following four indicators: "Instruction," "Learning
12 Environment," "Cultural Proficiency, "Expectations."¹³ Math Fellows are evaluated
13 under a different rubric that assesses the same major categories, but in greater detail,
14 providing examples of what would constitute an unsatisfactory, needs improvement,
15 proficient or exemplary rating.

16 Compensation/Benefits/Leave

17 The Tutors earn \$14.00 an hour. Their salaries are funded by grants, Title I
18 money and the Empowerment Zone.¹⁴ They are eligible for City of Springfield health,
19 dental, and long and short-term disability group insurance, and flexible spending

¹³ The "Cultural Proficiency" and "Expectations" indicators are designed to examine whether the Tutors' "create a respectful learning environment for their students with high behavior and academic expectations."

¹⁴ At the time of the investigation, it was anticipated that three Empowerment Zone schools would lose their funding for tutors.

1 account benefits. They receive ten sick paid days per year but no other paid leave or
2 holiday pay. They can also become part of the retirement system.

3 Hours/Work Year

4 Full-time Tutors work thirty-five hours per week for the duration of the academic
5 school year. No summer hours are available. Although Part-time Tutors are hired to
6 work twenty hours over a five-day workweek, payroll records show that they actually
7 work two or three days a week for seven hours a day.

8 Paraprofessionals

9 Duties and Other Terms and Conditions of Employment

10 As of July 2016, there were approximately 750 employees in the
11 Paraprofessional Unit. The majority of the members are paraprofessional who work
12 throughout its school system, including in pre-K, full-day kindergarten and elementary,
13 middle and high schools. Approximately 550 of these paraprofessionals have titles
14 denoting that they work in special education (SPED).¹⁵ Approximately 10-15% of the
15 unit works in "low incidence" classrooms where they support students with severe
16 special needs. Another 10-15% of the unit are kindergarten paraprofessionals.¹⁶

¹⁵ The SPED titles appearing on a spreadsheet the employer provided are "Spec Ed 1 on 1," (approx. 95), "Spec Ed K FD (2)," "Spec Ed Lrn Ctr Prm (2)," "Spec Ed Pre K Para," (approx. 60), "SPED LINKS Para,(7)," "SPED para", (approx. 400), "SPED Para Life Skills," (1.5), and "SPED pre K ABA Para" (6). In addition to the LPN, CNA, PTA and OTA titles that are in the unit, the spreadsheet includes thirty-two employees with the title "BILLING CLASSROOM SUP" and four employees with the title "CLASSROOM ACDMIC SUP." Because the principal of each school can move the paraprofessionals around as they see fit, however, the titles listed on the spreadsheet are not necessarily indicative of job duties. There are no separate job descriptions for these titles.

¹⁶ As of the investigation, there was only one bargaining unit member with the title "Assistant Teacher." This individual has held this title since 1971. She was given the

1 The job description appearing on several 2016 postings for the title "Instructional
2 Paraprofessional," including a posting for an Empowerment Zone school, states:

3 Paraprofessionals provide assistance to teachers and other school
4 personnel in the delivery of quality education and support services for
5 students in an array of classroom settings. Examples of support services
6 and educational settings include, but are not limited to: life skills,
7 developmental classrooms, social, emotional & behavioral support
8 (SEBS), LINKS (autism) program, visual or mobility orientation, language
9 learning delays and medical care.

10
11 In addition, the Collective Bargaining Agreement contains language in
12 Article V – Working Conditions . . . indicating that paraprofessionals hired
13 after ratification (April 16, 1998) are hired with Diapering/Toileting/Toilet
14 Training services as part of their job requirements. . .

15
16 This position is responsible for providing instructional assistance,
17 classroom support, and implementation of effective strategies and
18 procedures under the direction of classroom teachers and/or other school
19 personnel. . . ¹⁷

20 The academic support provided by paraprofessionals is primarily limited to
21 students with special needs or who are on individualized learning plans and is based
22 on classroom curriculum. There are exceptions however. From 2007-2011, Union

Assistant Teacher title because she held an Associate's degree, which was uncommon in 1971. The current Assistant Teacher was grandfathered into the title, and, at the time of investigation, worked in a Life Skills classroom at the Van Sickle School, where her duties are the same as other paraprofessionals.

¹⁷ These findings are based exclusively on the 2015 job postings that were attached to the charge. Although the Employer provided a job description for the title "Paraprofessional – Teacher's Aide," no weight has been given to this document because the Union disagreed with its contents and because it is undated and appears to be much older than the postings attached to the charge. The Union provided a 2016 posting for a SPED Paraprofessional at the UP Academy Kennedy Middle School (UP Academy). According to the posting, the UP Academy was scheduled to open in the fall of 2016 as a turnaround school operated by the "UP Education Network in partnership with the SEZP." No weight has been given to this document either because the school was not open when the document was created.

1 President Catherine Mastronardi (Mastronardi) worked in a computer lab under the
2 direction of the lab teacher and the Math Department Chair. The students worked
3 primarily on a program that was used by districts to improve MCAS Math scores for
4 students who failed Grade 10 math. Mastronardi worked with students individually and
5 in small groups. She also served as a substitute teacher when the lab teacher was
6 absent.

7 Qualifications

8 The 2015 job postings contain the following educational requirements: High
9 School diploma or GED, and Associates of Arts or Science Degree or higher, or 60
10 undergraduate college credits, or meeting or exceeding the State mandated score on
11 the Paraprofessional Assessment or Work Keys Assessment. The preferred
12 qualifications are a BA degree with educator licensure and experience working with
13 special education students in an education setting.

14 Hiring/Supervision/Evaluation

15 Paraprofessionals are hired by the principal of the school where they work and
16 report to the classroom teacher and the principal. Newly-hired paraprofessionals are
17 subject to a 120-working-day probationary period. Pursuant to Article V. L. of the CBA,
18 paraprofessionals who complete this probationary period cannot be discharged,
19 suspended, demoted or disciplined except for good cause, as defined in the CBA.

20 Pursuant to Article XII.A of the CBA, each paraprofessional is evaluated by the
21 principal or his/her designee, who may be a teacher. Under this provision, the
22 paraprofessional may be rated on such items as: promptness and good attendance;
23 cooperation with teachers; ability to work with children; dependability in carrying out

tasks; and quality of work and discretion. Paraprofessionals are evaluated yearly during their first ten years of service and once every two years after that.

Compensation/Benefits/Leave

Pursuant to Appendix A of the CBA, effective July 1, 2015, paraprofessionals without any college credits or degree earned an hourly wage ranging from \$14.64 to \$16.84 depending on years of experience. The range for paraprofessionals with at least "60 credits or highly qualified status," or a Bachelor's degree, was from \$14.78 - 14.89/hour to \$18.01 to \$18.32/hour, depending on years of experience. All unit members are eligible for overtime pay.

Paraprofessionals are eligible to participate in the City's group health insurance and pension and retirement plans.

Under Articles VII and VIII of the CBA, paraprofessionals are provided with several different types of paid leave, including ten days of disability and emergency leave, reserve duty leave, religious leave, bereavement leave, and graduation leave. They also receive fourteen paid holidays and pay for the days when schools are closed due to an emergency.

Hours/Work Year

Under Article V. F, the paraprofessionals' work day is 6.5 hours, exclusive of a duty-free half-hour lunch period. The work year is the regular school year (180 student days), and a number of additional days, e.g., day before school starts and paid professional development days.

Paraprofessionals who wish to work in summer school must file an application in writing with the Superintendent of Schools or his/her designee. Under the terms of

1 Article XVI of the CBA, preference is given to “qualified applicants for the position which
2 corresponds to the applicant’s regular day school assignment.”

3 Career Growth
4

5 Over the years, both Tutors and paraprofessionals have transitioned to SPS
6 teaching positions. Forty-one of the Tutors who were employed by the SSV have since
7 become SPS teachers. In the 2015-2016 school year, the Union worked with Human
8 Resources, Academics and Administration departments to begin development of a
9 Paraprofessional to Teacher Pipeline Program.

10 Opinion¹⁸

11 A unit clarification is the appropriate procedural vehicle to determine whether
12 newly-created positions should be included in or excluded from a given bargaining unit
13 or to determine whether substantial changes in the job duties of an existing position
14 warrant inclusion or exclusion from a bargaining unit. Town of Athol, 32 MLC 50, 52,
15 CAS-04-3567 (June 29, 2005). The CERB conducts a three-part analysis to determine
16 whether accretion is the appropriate procedural vehicle to add employees to a unit
17 without having an election. City of Boston, 35 MLC 137, 140, CAS-07-3669 (December
18 31, 2008). The first part of the test considers whether the position at issue was covered
19 by the original certification or recognition. If the same position existed when the unit first
20 formed and was not included in the unit, the CERB will not accrete that title into the unit.
21 Holyoke School Committee, 21 MLC 1765, CAS-3055, (April 27, 1995).

22 If that inquiry is inconclusive, the CERB next examines whether the parties’
23 subsequent conduct, including bargaining history, discloses that the parties considered

¹⁸ The CERB’s jurisdiction is not contested.

1 the position to be included in or excluded from the existing bargaining unit. City of
2 Boston, 35 MLC at 140. Under this part of the test, the CERB examines how the parties
3 have treated the disputed positions in their dealings with each other and in collective
4 bargaining. Boston Public Health Commission, 39 MLC 218, 230, CAS-11-1091, 1092
5 (February 28, 2013). The CERB will not accrete a position into an existing bargaining
6 unit if the parties have executed a collective bargaining agreement demonstrating an
7 intent to exclude the petitioned-for positions unless the job duties of the position have
8 materially changed. Id. (additional citations omitted).

9 Finally, if that analysis is inconclusive, the CERB examines whether the position
10 shares a community of interest with other positions in the existing bargaining unit. If the
11 CERB determines that the a community of interest exists, it will accrete the petitioned-
12 for employee into the existing bargaining unit. City of Boston, 35 MLC at 140.

13 The first two prongs of the accretion analysis are inconclusive in this case. The
14 first prong is inconclusive because the Tutors were not in existence when the
15 Paraprofessionals Unit was first certified in 1988. The second prong is inconclusive
16 because there is no bargaining history showing that the parties agreed either to include
17 or exclude the Tutors from the Paraprofessionals Unit. Rather, when the Tutors
18 became school employees, the Union requested to bargain but the City refused. Board
19 of Higher Education, 36 MLC 139, 141, CAS-06-3659 (March 5, 2010) (union's protests
20 over placement of position outside of its bargaining unit rendered second prong of
21 accretion analysis inconclusive because it demonstrates that parties did not consider
22 position to be in unit). We therefore turn to the third prong to examine whether the

1 Tutors share a community of interest with the members of the Paraprofessionals Unit
2 such that accretion is appropriate.

3 To determine whether employees share a community of interest, the CERB
4 considers factors like similarity of skills and functions, similarity of pay and working. No
5 single factor is outcome determinative. Id.

6 The Employer opposes accreting the Tutors on grounds that they do not share a
7 community of interest with the paraprofessionals due to differences in hiring practices,
8 supervision, academic qualifications, hours, work location, and the nature of their work.
9 We disagree. We have repeatedly stated that the Law requires that employees share
10 only a community of interest rather than an identity of interest, provided there is no
11 inherent conflict among consolidated groups of employees. County of Dukes
12 County/Martha's Vineyard Airport Commission, 25 MLC 153, 155, MCR-4700 (April 16,
13 1999); Springfield Water & Sewer Commission, 24 MLC 55, 59, MCR-4603 (January 15,
14 1998); Franklin Institute of Boston, 12 MLC 1091, 1093, MCR-3409 (July 18, 1985). For
15 the reasons set forth below, we find no such inherent conflicts here and conclude that
16 the Tutors and the paraprofessionals share a community of interest based on the
17 similarities in their duties, educational requirements, rate of pay, hours, work location
18 and work contact.

19 Generally speaking, like all other positions in the unit, the Tutors are non-
20 professional, non-supervisory employees that provide support services to students who
21 have been deemed, for a variety of reasons, to need some type of extra assistance in
22 the school setting. More specifically, the two groups have similar rates of pay and
23 hours. The Tutors work 35 hours per week at the rate of \$14.00 an hour; the

1 paraprofessionals work 32.5 hours per week with a half-hour unpaid lunch break and at
2 the rate of between \$14.64 to \$18.32 an hour depending on their level of education and
3 length of experience. Although the record shows that some Tutors work on a part-time
4 basis, this does not affect our analysis. The CERB traditionally places part-time
5 employees in the same unit with full-time employees who perform the same or similar
6 work. See, e.g., Town of Seekonk, 30 MLC 121, 127, MCR-03-3053 (March 12, 2004);
7 Town of Milford, 22 MLC 1625, 1630, MCR-4395 (March 20, 1996).

8 The education and requisite experience of the positions are similar as well.
9 Tutors are required to hold an Associate's degree, and the paraprofessionals are
10 required to hold a high school degree *plus* some additional college credits or
11 certification including an Associate's degree. Where both positions prefer, but do not
12 require a Bachelor's degree, and where there is no dispute that both titles are not
13 professional employees within the meaning of Section 1 of the Law, we find that the
14 educational qualifications for Tutors are not materially different from the minimum
15 requirements for a paraprofessional.

16 In arguing that the Tutors and paraprofessionals do not share a community of
17 interest, the Employer emphasizes the difference in their supervisory structure – that
18 Tutors report to the Tutor and Site Coordinators and work under a central curriculum
19 while paraprofessionals work alongside the classroom teacher and implement his or her
20 curriculum. This factor is not outcome determinative for several reasons. First, it is not
21 entirely accurate. With respect to actual supervision, the record reflects that the Tutors
22 who work at the nine Empowerment Zone schools report to the same principal as the
23 paraprofessionals at those sites. With respect to work location, the evidence shows that

1 not all paraprofessionals work exclusively inside the classroom and that the Employer
2 has initiated a program where Math Tutors work inside the classroom. And regardless of
3 the precise work location, the record shows that both groups of employees work inside
4 school buildings in an instructional setting.

5 Second, the Employer's arguments concerning supervision and curriculum
6 implementation ignore the fact that the Paraprofessional Unit has historically included
7 titles that typically work outside the classroom, such as the Library Aides, who were
8 included in the original 1980 certification. The Employer's argument also overlooks the
9 fact that, as described in Springfield School Committee, the Paraprofessionals Unit also
10 includes titles that report to someone other than the classroom teacher, like the LPNs,
11 who perform a variety of health services under the supervision of the Nursing
12 Supervisor, and the OTAs and PTAs, who are supervised by occupational and physical
13 therapists and implement their written treatment plans. Springfield School Committee,
14 29 MLC at 113. Indeed, in Springfield, the CERB relied on these similarities to *support*
15 its finding that the OTAs and PTAs shared a community of interest with the LPNs. 29
16 MLC at 113. Here, similar to the LPNs, OTAs and PTAs, the Tutors report to, and
17 implement a curriculum prepared by, someone other than the classroom teacher.

18 The Employer also points out that the Tutors perform none of the physical duties
19 that the paraprofessionals perform. While this may be true, it ignores the fact that the
20 paraprofessionals, like the Tutors, provide instructional support in addition to other types
21 of physical support. It also ignores the fact that the CERB has twice (once through
22 certifying a unit that included LPNs, and once through the 2002 OTA/PTA CAS petition)
23 deemed a unit comprised of non-professional employees who work directly with

1 students in a school setting to provide a mix of instructional, physical and other types of
2 adaptive, social or behavioral assistance and support to the student's education
3 program, to be an appropriate unit for collective bargaining.

4 On these grounds, we find that the Tutors share a community of interest with the
5 rest of the Paraprofessionals Unit. The Employer's efforts to depict the Tutors as
6 working in settings and under working conditions that are entirely divorced from the
7 settings in which the paraprofessionals work is simply not borne out by the facts found
8 above. Moreover, none of the differences cited by the Employer create inevitable or
9 irreconcilable conflicts that cannot be resolved through effective negotiation either at the
10 bargaining table or during the administration of a collective bargaining agreement. City
11 of Worcester, 11 MLC 1363,1365, MCR-3475, CAS-2597 (January 23, 1985) (citing
12 University of Massachusetts, 4 MLC 1384, 1392, SCR-2070 (October 18, 1977)).

13 The Employer's remaining arguments against accretion are rooted in its effort to
14 distinguish Walpole School Committee, 12 MLC 1015, MCR-3499 (June 19, 1985),
15 which the Union cites in support of its petition. In Walpole, the CERB dismissed a
16 representation petition seeking to represent a separate unit of instructional assistants
17 and tutors on grounds that the petitioned-for employees did not have a separate
18 community of interest from either the existing teachers bargaining unit or the existing
19 non-professional aides bargaining unit that would warrant the creation of a separate
20 bargaining unit. Id.

21 The Employer claims that Walpole is distinguishable for several reasons,
22 including that the differences between the Tutors and paraprofessionals in this case are
23 far more pronounced than was the case with either unit in Walpole. The Employer

1 argues that these differences, coupled with the number of Tutors at issue here, could
2 support a determination that would justify placing the Tutors in a unit of their own. The
3 Employer further claims the Tutors have expressed no desire for union representation
4 and it should not be forced upon them. We address each of these arguments in turn.

5 First, as the Employer points out, Walpole was a representation petition, not an
6 accretion petition. Accordingly, the issue before us is not whether the Tutors could
7 constitute a separate unit as it was in Walpole, but whether the Tutors should be
8 accreted to the Paraprofessionals Unit under the three-part accretion analysis.¹⁹ We
9 hold that they should for the reasons set out above.

10 Second, as to the Employer's claim that the Tutors have expressed no desire for
11 union representation, it is well-established that where there is no evidence that a
12 question of representation exists, as described below, employees in newly-created
13 positions properly may be accreted into an existing bargaining unit without first having
14 an election and are properly governed thereafter by the unit's choice of exclusive

¹⁹ We note, however, that on at least one other occasion the CERB rejected a representation petition from a unit of tutors seeking their own bargaining unit where a group of employees with similar duties and terms and conditions of employment was already represented. See Pittsfield School Committee, 12 MLC 1487, MCR-3486, (December 31, 1985) (dismissing petition seeking to represent a bargaining unit composed of all full-time and part-time assistant Chapter I teachers on grounds that they did not demonstrate a separate community of interest from teachers' aides represented by the existing paraprofessional unit). But see Lawrence School Committee, MCR-02-5009, 5010 (May 16, 2003 (declining to dismiss representation petition seeking to represent full-time and regular part-time therapeutic, language and childcare assistants on ground that the differences in education, duties pay and work contact between employees in the petitioned-for unit and the existing teachers and paraprofessionals units were sufficient to warrant separate representation)).

1 representative. Massachusetts Laborers' District Council, 15 MLC 1178, 1180, CAS-
2 2734 (September 20, 1988).

3 The CERB has recognized that some proposed accretions will involve groups of
4 employees whose number or other characteristics may raise questions concerning
5 representation such as to warrant election. See, e.g., Waltham School Committee, 25
6 MLC 137, 140, n. 17 (1999); Massachusetts Laborers' District Council 15 MLC at 1191
7 (citing City of Worcester, 11 MLC at 1366). Specifically, the CERB has found a
8 question concerning representation to exist where: 1) the number of employees sought
9 to be accreted exceeds the number of employees in the existing unit, see, e.g.,
10 Massachusetts Bay Transportation Authority, 20 MLC 1330, CAS-3024 (December 22,
11 1993); 2) the positions sought to be accreted either existed, unchanged at the time of
12 the original certification or recognition, and/or the positions have been intentionally
13 excluded from the unit by the parties since they were created. See, e.g., City of
14 Worcester, 11 MLC at 1366 (dismissing CAS petition seeking to accrete fire alarm
15 operators into police dispatchers unit as inappropriate because the fire alarm operators
16 existed at the time the police dispatchers unit was originally certified). None of those
17 conditions are present here.

18 No other CERB decision has dismissed a CAS petition solely on grounds that the
19 disputed employees had not been given the opportunity to vote on whether they wished
20 to be represented for purposes of collective bargaining. Although those grounds were
21 cited as one of two reasons for the dismissal of the CAS petition in the City of Worcester
22 decision cited above, that case is easily distinguishable from the matter before us for
23 two reasons. First, as described above, the disputed fire alarm titles existed at the time

1 the police dispatchers unit was originally certified. As the CERB stated, the petition was
2 inappropriate on those grounds alone. Id. Second, City of Worcester involved two
3 petitions – a representation petition filed by the Massachusetts Laborers District Council
4 Local 176 (Local 176) seeking to represent the fire alarm operators in a separate
5 bargaining unit and the CAS petition subsequently filed by the City of Worcester seeking
6 to accrete the fire alarm operators into the police dispatchers union represented by
7 Local 495, SEIU (Local 495). Id. at 1363. Because Local 176's representation petition
8 and the CAS petition were pending at the same time and concerned the identical group
9 of employees, we would agree that a question concerning representation existed that
10 justified the dismissal of the CAS petition on grounds that the fire alarm operators had
11 not yet had a chance to vote on whether they wanted Local 495 to represent them.²⁰

12 Here, by contrast, no other union has filed a representation petition seeking to
13 represent the Tutors in a separate bargaining unit and, thus, the concerns expressed in
14 City of Worcester are not present here. Because none of the other factors exist that
15 create a question concerning representation, the Employer has failed to demonstrate
16 that the accretion of the Tutors raises a question concerning representation sufficient to
17 warrant an election.

²⁰ The CERB affirmed the Hearing Officer's dismissal of the representation petition on grounds that the Fire Alarm Operators and the Police Dispatchers performed essentially the same work and thus could not show a distinct community of interest from other employees to warrant their separate representation. 11 MLC at 1365.

1 Conclusion

- 2 Based on the foregoing, we determine that the Tutors are appropriate for
3 inclusion in the Paraprofessionals unit and direct that the unit description be amended
4 to include them.
5 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


JOAN ACKERSTEIN, CERB MEMBER

John Deere