

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

In the Matter of:

WESTWOOD COMMUNITY SCHOOLS,
Public Employer,

MERC Case No. R16 F-054

-and-

MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Petitioner.

APPEARANCES:

Guerriero Law Firm, by Anthony S. Guerriero, for the Public Employer

McKnight, Canzano, Smith, Radtke and Brault, P.C., by Lisa M. Smith, for Petitioner

DECISION AND ORDER

On June 29, 2016, the Michigan Education Association (Petitioner or MEA) filed the above petition for representation election with the Michigan Employment Relations Commission (Commission). Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, the petition was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Commission.¹ Based on the record of the evidentiary hearing held on December 13, 2017, and January 16, 2018, and post-hearing briefs filed by both parties on May 14, 2018, the Commission finds as follows:

The Petition and Positions of the Parties:

Petitioner seeks, by election, to add two previously unrepresented Junior Reserve Officers Training Corp instructors (hereinafter JROTC instructors) to an existing unit of employees of the Westwood Community Schools (the Employer). The parties' current collective bargaining agreement, which expires on August 31, 2018, describes this unit as follows:

...all professional educational personnel certified by the Michigan Department of Education, under contract or on approved leaves of absence, excluding substitute

¹ MAHS Hearing Docket No. 16-021482-MERC

personnel, teacher aides and other auxiliary personnel, all supervisory, administrative and executive personnel, and all other employees.

The above unit description has remained unchanged through the duration of many previous contracts. The unit currently includes teachers, speech pathologists, social workers, and a psychologist.

Petitioner asserts that the two JROTC instructors, who are full-time employees of the Employer assigned to work at its Robichaud High School, share a community of interest with its unit of teachers and other professional employees. The Employer asserts that the petition should be dismissed because: (1) as the JROTC instructors are not certified in any profession by the Michigan Department of Education, they are ineligible for inclusion in Petitioner's bargaining unit by the language of its contract's recognition clause; (2) there is no community of interest between the JROTC instructors and the teachers in Petitioner's unit because the former are subject to rules and regulations promulgated by the United States Army (hereinafter the Army); and (3) no collective bargaining can take place between Petitioner and the Employer over the terms and conditions of the JROTC instructors' employment because these terms and conditions are effectively established by the Army.

Findings of Fact:

In May 2001, the Employer applied to the Army to establish a cost-shared JROTC program for students at its Robichaud High School. In a cost-shared program, as discussed below, the Army picks up a portion of the instructors' salaries and provides the school district with uniforms, equipment, and the JROTC curriculum. After an inspection and determination by the Army that the Employer met the conditions for the program, the Employer's application was approved, and the Employer began offering JROTC classes in 2002. The Employer has two JROTC instructors, William Azbill and Michael Grant.

As a condition of being permitted to have a JROTC program, the Employer is required to comply with a 258-page regulation promulgated by the Army entitled Cadet Command Regulation 145-2 (CCR 145-2). Per CCR 145-2, the principal of the school where the instructors teach supervises them. However, Army employees with the title Cadet Command Brigade Commander also oversee and supervise JROTC units in their districts. The Brigade Commanders are responsible for ensuring compliance with CCR 145-2 in their districts.

The Employer's Superintendent, Sue Carnell, testified that the Employer considered the JROTC program as a "contracted service," with CCR 145-2 constituting the terms of the Employer's contract with the Army for this service. However, CCR 145-2, Section 4-3(b) states explicitly that "the school district or school board is the employing entity of the instructors."

JROTC instructors must be certified by the Army as qualified for the positions they hold. A Senior Army Instructor must be a retired military officer and have at least a bachelor's degree. An Army Instructor must be a retired military officer or non-commissioned officer (NCO), and complete an associate degree within five years of certification. Retired military officers apply and go through the process set out in CCR 145-2 to be certified. According to the regulation, to

qualify as a JROTC instructor, an individual must have “general knowledge of course subject matter and demonstrated instructional ability.” Before certification, JROTC instructors must take a two-hour class which covers teaching techniques and must pass an examination designed to measure their understanding of instructor skills. Every five years, JROTC instructors are required to attend a week-long recertification program.

The Employer’s teachers must be certified as teachers by the Michigan Department of Education (MDE). Its speech pathologists, psychologists and social workers are not required to be certified as teachers, but are required to be certified in their professions by either the MDE or another state department. The Army does not require state certification as a teacher, formal education in teaching methods, or experience in teaching at the high school level for either instructor position. However, according to the Army’s website, if the state in which the instructor teaches requires additional licensure or certification beyond Army certification, the instructor, as a school district employee, must meet these requirements. Unlike some states, Michigan does not have a special certification for JROTC instructors; nor does Michigan require JROTC instructors to be certified teachers.

The Army maintains a database of certified instructors. Before hiring a JROTC instructor, a school district must notify the Army that it has a vacancy and obtain approval to fill it. The school district then posts the vacancy on its website or wherever it normally advertises vacant positions. The Army will, upon request, provide the school district with the names of certified JROTC instructors who have expressed interest in the school district’s geographic area. It also provides a link on its website to known instructor vacancies for certified JROTC instructors looking for employment. Superintendent Carnell testified that the Employer has always hired from a list provided by the Army, and she believed that the Employer was required to hire from this list.

The Employer gives applications that it receives to Robichaud’s principal, who, if the Employer has received more than one application from a certified instructor, decides who to hire. Once it selects a candidate, the Employer sends the Army a letter requesting approval to hire the candidate and containing his or her name, rank, date of retirement, date of certification, social security number and other information. The Army then provides the school district with an initial estimate of the instructor’s minimum instructor pay, or MIP, discussed below. When all other steps are completed, the Employer sends the instructor a written offer of employment setting out the pay, location, and other conditions of employment.

The Employer’s current Senior Army Instructor, Lieutenant Colonel William Azbill, was hired in 2015. He has two master’s degrees. He is certified to teach in Texas as a secondary social studies teacher and holds a separate Texas certification for secondary ROTC. In Michigan, he possesses a Temporary Teacher Employment Authorization from the MDE. In addition to other army experience and non-service work experience, Azbill has experience as an Army training officer, as a Senior Army instructor in a college ROTC program, as a Senior Army Instructor in a high school JROTC program in Texas, and as a Senior Army Instructor in a JROTC program in another Michigan school district. Azbill has not taught subjects other than JROTC in a K-12 classroom. Army Instructor Sergeant First Class Michael Grant has been a JROTC instructor at Robichaud longer than Azbill. Grant was formerly a medic in the Army. He

currently has a bachelor's degree and is working on a master's degree. He does not hold a state teaching certificate of any type.

The Army's JROTC curriculum, which is aligned to national Common Core State Standards, includes course work in a variety of subjects, including civics, U.S. history, geography and global awareness, health and wellness, language arts, and life skills. It also provides citizenship and leadership training, and, according to the Army's website, promotes a capacity for life-long learning, communication, responsibility for actions and choices, respectful treatment of others, and critical thinking skills. The cadet staff is organized in a military fashion, with a cadet/student lieutenant commander who provides overall direction to the group and cadet officers who each have an area of responsibility. JROTC is available as an elective course for 9th, 10th, 11th and 12th graders. The students/cadets receive credit and grades for the course as in any other high school course.

The JROTC program also includes co-curricular activities, including a raider (athletic and adventure) team, a precision color guard team, a marksmanship team, and a knowledge bowl team. At Robichaud, some of these co-curricular activities are scheduled during the first two class periods because many students are unable to stay after school. However, there are also Saturday practices and some afterschool events. Several co-curricular activities, including a camp, occur during the summer when school is not in session. The Army's website for potential JROTC instructors states that JROTC instructors should be prepared to work as many as 50 hours per week.

The Army establishes the JROTC curriculum for each level (1st through 4th year) of the program. Its Program of Instruction (POI) identifies mandatory lessons for each level, as well as electives. At the beginning of each school year, each JROTC unit submits a "master training schedule" to the Army for approval; the schedule must show each subject, including electives; the number of hours required, and the number of hours scheduled for each subject on a week-by-week basis. Lesson plans have been developed by the Army for each lesson which incorporate methods of instruction developed by the Army for its JROTC classes. The Army issues a hard drive, called a "curriculum manager" to its JROTC instructors, and updates to lesson plans and the curriculum are available to instructors through a private web portal.

Most of the student/cadets in the Employer's JROTC program are students in the Employer's district, but the program also currently includes students from other districts with which the Employer has a consortium agreement. Each student has one classroom period of JROTC instruction per day; some periods combine two regular class periods. Classes typically combine JROTC students in different grades. The JROTC instructors, like other Robichaud teachers, receive class schedules and class lists at the beginning of each school semester. Like other Robichaud teachers, the JROTC instructors report student grades to the Employer using Employer-provided timelines and Employer grading scales and are required to submit daily attendance reports.

The Employer's two JROTC instructors occupy two classrooms combined into one large room at Robichaud High School. They also conduct some instruction in the school's gym. As noted above, the Army supplies equipment, including cadet uniforms, for the JROTC program.

The Employer's two JROTC instructors have two rooms within Robichaud for the storage of JROTC equipment. The JROTC instructors share a teachers' lounge with other Robichaud teachers.

If the JROTC instructors need to leave school early or to request time off, they notify either Robichaud's principal or its assistant principal. They use the same system as other teachers to notify the Employer if they are unexpectedly absent.

Carnell testified that, to the best of her knowledge, the Army must approve the discipline or termination of a JROTC instructor. However, the regulations cited by the Employer in support of this claim suggest that a school district does have the authority to discipline or terminate the employment of a JROTC instructor, although the school district must notify the Army if an instructor is suspended or terminated.

The Michigan statutes governing how a school district is to evaluate its certified teachers do not apply to JROTC instructors. According to Section 5-3 of CCR 145-2, a Senior Army Instructor is to observe the instruction and assess the performance of the Army Instructor using a rubric prepared by the Army and take appropriate remedial action as outlined in the regulation. A Senior Army Instructor is to ask a school administrator to observe and evaluate him or her. Brigade Commanders are responsible for performance counseling for JROTC instructors as part of their regular inspections of the unit, although Section 4-21(b) states that "The evaluation of classroom performance of instructors will be conducted using the school's evaluation report (if applicable) during classroom evaluations and inspections." Azbill testified that he has not received an evaluation since he was hired by the Employer in 2015, but that he had been told by Robichaud's principal that he would receive one at the end of the 2017-2018 school year.

Section 4-3(a) of CCR 145-2 requires that JROTC instructors be "used only for that purpose and [that] assigned duties [be] directly related to the JROTC unit." CCR 145-2 also states, in Section 4-3(c)(2), that instructors are not to be expected to "perform unpaid additional duties beyond those performed by other teachers," and "if any additional sum is paid for the services, the Army will not reimburse the school for these services." Per Article VI of the parties' collective bargaining agreement, teachers in the Employer's high school can be forced to substitute teach, at no additional pay, no more than once a week, if no teacher volunteers and there is no administrator available. Employer Superintendent Sue Carnell testified that, as far as she knew, the Army prohibited the Employer from assigning Azbill or Grant to the ancillary duties that members of Petitioner's bargaining unit are required to perform, like substituting in other classrooms during their preparation periods.

Azbill testified that he has substituted in other teachers' classrooms when the principal has asked him to do so. According to Azbill, he has also chaperoned field trips for students in other grades, including students not enrolled in JROTC, on dates that the Robichaud 11th graders are taking standardized tests. Like other Robichaud teachers, Azbill and Grant supervise the halls while students are passing between classes. They also attend staff meetings and participate in an annual open house for eighth grade students. Because the JROTC curriculum is established by the Army and includes lesson plans, JROTC instructors are not responsible for preparing lesson plans and do not participate in curriculum committees. However, the Employer's JROTC

instructors have participated, along with other high school teachers, in school-wide activities, such as the recent collection of water bottles for the City of Flint.

In a cost-shared shared JROTC program like the Employer's, the salaries of the JROTC instructors are paid by the Employer with the Army reimbursing it for half the cost of their salaries and providing equipment free of charge. The salaries of members of Petitioner's bargaining unit are determined by collective bargaining and are set out in the salary schedule of the parties' contract. Under CCR 145-2, the Employer is required to pay each JROTC instructor his or her minimum instructor pay (MIP), as calculated by the Army each year. Per CCR 145-2, for an instructor employed by the school 12 months per year, their MIP is the difference between the amount of the instructor's retirement pay and the instructor's "active duty pay." As described in the regulation, "active duty pay" consists of the instructor's "basic pay," which is calculated based on his or her military rank and years of service, plus cost-of-living increases. Although the MIP is calculated based on a 12-month work year, CCR 145-2 allows for a 10-month work year, with a consequent reduction in salary. The Employer has received permission from the Army for the shorter year.

Members of Petitioner's bargaining unit receive fringe benefits negotiated by the parties and set out in the collective bargaining agreement. The Employer is required by CCR 145-2, to offer instructors the same benefit package received by teachers of comparable status. JROTC instructors also receive health insurance as military retirees and may elect to receive benefits under that plan as Azbill has done. As with any other employee, the Employer is required to pay into the Michigan Public School Employees Retirement System (MPERS) for its JROTC instructors, and they are part of its pension system.

Although a school district can pay more than the MIP, and CCR 145-2 encourages it to do so, the Army's reimbursement is limited to one-half of the MIP. The Employer has never paid its JROTC instructors more than their MIPs. The requirement that JROTC instructors be paid their MIP has been a sore point for the Employer since at least 2012, when the Employer was forced to file a deficit elimination plan with the State of Michigan. As part of this plan, all members of Petitioner's bargaining unit and other employees accepted a 12% pay cut. Although the Employer reduced the length of the JROTC instructors' work year at that time, because of CCR-145-2, the JROTC instructors did not have their salaries cut by 12% as did the Employer's other employees. The two JROTC instructors also continued in subsequent years to receive the cost-of-living increases folded into their MIPs, a benefit not enjoyed by the members of Petitioner's bargaining unit. Although the salary that the Employer paid to its Senior Army Instructor even in 2012 was more than it paid to any teacher, for the 2017-2018 school year, to the Employer's great chagrin, Azbill received an annual salary that was \$6,000 more than that of the highest paid member of Petitioner's bargaining unit.²

In addition to setting MIPs, CCR 145-2 also establishes a minimum staffing level based on the number of students/cadets in the Employer's program. Based on the number of its cadets, the Employer is required to employ one Senior Army Instructor and one Army Instructor. As with the MIPS, an Employer can hire additional instructors, but the Army will not reimburse it

² According to the salary schedule in the parties' collective bargaining agreement, the salary of a teacher in the bargaining unit at the top of the salary scale was about \$12,000 less in 2017-2018 than in 2010-2011.

for the cost of their salaries. The Employer has never had more instructors than CCR 145-2 requires.

The maximum class size for teachers in Petitioner's unit, negotiated by the parties and set out in the collective bargaining agreement, ranges from 28 in grades kindergarten through second grade to 40 in physical education, art, and music classes. The maximum for regular classes in the Employer's high school is 35. CCR 145-2, Section 5-4(b) states that the optimum class size for a JROTC class is 20 students, and the maximum number of students in a JROTC class is not to exceed 30, "unless in accordance with other academic courses."

The length of the JROTC instructors' workday is the same as that of other teachers at Robichaud. A normal school day at Robichaud has seven class periods. Teachers in the bargaining unit have six assigned teaching periods, plus one preparation period per day. However, CCR 145-2, Section 4-3(c)(2) requires a school district to assign JROTC instructors one class period per day, in addition to their normal preparation period, for "associated duties." Consequently, the JROTC instructors have only five teaching periods, instead of six, each day.

Section 5-4(f) of CCR 145-2 states that JROTC courses can be taught in separate periods of 45 or 50 minutes, or, as part of a block schedule, in periods of 90 or 100 minutes "which can be taught as two 45 and 50-minute classroom sessions (two unit hours.)" According to the Employer, it recently considered expanding the length of class periods, and presumably the length of the school day, at Robichaud to increase instructional time, but could not do so because of scheduling problems caused by the JROTC program and Section 5-4(f).

Section 4-3(b) of CCR-145-2 includes this language:

Schools are expected to support JROTC instructors equally with other department heads and teachers in the school. For example, JROTC instructors must be involved in budget and other school decisions, included in professional/staff development, offered the same opportunities for teacher of the year, receive equitable supplemental pay/stipends for integrated-curricular activities, etc.

Each year, the Employer holds two days of professional development for teachers before the beginning of the school year, and Azbill has attended these sessions. Azbill testified, however, that he was told that he could not participate in professional development held after school hours because the Employer could not pay him extra.

Discussion and Conclusions of Law:

In view of the particular facts relevant to this case, we agree with the Employer that the JROTC instructors and the members of Petitioner's bargaining unit do not share a community of interest. The traditional factors examined in determining community of interest are similarities in duties, skills and working conditions between groups, similarities in wages and employee benefits, amount of interchange or transfer between groups of employees, centralization of the employer's administrative and managerial functions, degree of central control of labor relations, common promotion ladders and common supervision. See, e.g., *Ferris State Univ*, 30 MPER 63

(2017); *Covert Pub Sch*, 1997 MERC Lab Op 594; 11 MPER 29016; *St Clair Comm Coll*, 1988 MERC Lab Op 687.

In the present case, the JROTC instructors are not required to be certified as teachers by the Michigan Department of Education (MDE). Although the Army trains and tests JROTC instructors before it certifies them, the educational and other qualifications established by the Army for the JROTC instructor position are not the same as those required to retain certification as a teacher by the MDE. Consequently, there is no interchange or transfer between JROTC instructors and the employees in Petitioner's bargaining unit or common promotion ladder. Although JROTC instructors and some members of Petitioner's bargaining unit teach students, the JROTC curriculum is set by the Army. Its Program of Instruction (POI) identifies mandatory lessons for each level, as well as electives. The JROTC curriculum may not be altered by the Employer.

Additionally, there is no dispute that Army Regulation CCR 145-2 (1) establishes the minimum salary that the Employer must pay its JROTC instructors; (2) requires the Employer to schedule JROTC instructors for one more daily preparation period than other teachers; (3) establishes a maximum class size for JROTC classes; and (4) effectively limits the length of the JROTC instructors' normal work day. As a result, Army Regulation CCR 145-2 significantly limits the amount of collective bargaining that can take place between Petitioner and the Employer over the terms and conditions of the JROTC instructors' employment.

Furthermore, in a cost-shared JROTC program like that involved in the present case, the salaries of the JROTC instructors are paid by the Employer with the Army reimbursing it for half the cost of their salaries and providing uniforms and equipment free of charge.

Based on the lack of interchange or transfer between employee groups and the disparity in the degree of governmental regulation and funding between the groups, we conclude that the JROTC instructors do not share a community of interest with Petitioner's unit and should not be allowed to vote on whether to become part of the unit. We, therefore, will not direct an election as requested by Petitioner.

Moreover, even if we found that a community of interest existed between the JROTC instructors and the members of Petitioner's bargaining unit, the Commission has long recognized that bargaining history should not be disregarded in determining whether a proposed unit is one appropriate for collective bargaining. *Wexford Cnty Rd Comm*, 1973 MERC Lab Op 895. On this basis, we have deferred to bargaining history even though we might have originally structured the unit differently and have found that there is a heavy burden on the party seeking to disturb an established bargaining relationship. *Ferris State Univ*, 15 MPER 33059 (2002), *C.S. Mott Comm Coll*, 1980 MERC Lab Op 400, 412. In the present case, the JROTC instructor positions were established in 2002. The instant petition, however, was not filed until 2016. At no time during this 14-year period were the instructor positions ever treated as if they were covered by any collective bargaining agreement. A bargaining history of 14 years' duration is simply too long to ignore. Consequently, we find that, in view of the history of bargaining between the parties, the Petitioner seeks an inappropriate unit and that the Petition must also be dismissed on this basis. We therefore enter the following order:

ORDER

For the reasons set forth above, and in accord with the findings and conclusions herein, the petition is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____/s/
Edward D. Callaghan, Commission Chair

_____/s/
Robert S. LaBrant, Commission Member

_____/s/
Natalie P. Yaw, Commission Member

Dated: September 19, 2018