AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between the	:	
NEWTON TEACHERS ASSOCIATION,	:	
Grievant,	:	Opinion and Award AAA 01-23-0002-3083
and	:	
NEWTON SCHOOL COMMITTEE,	:	
Employer.	:	

Before: Jeffrey R. Cassidy, Arbitrator

Hearing: October 19, December 8, 2023

APPEARANCES

Massachusetts Teachers Association, Laurie Houle, Staff Counsel, Quincy, MA, for the Grievant.

Valerio Dominello & Hillman, LLD, John Foskett, Esq., Westwood, MA; *Newton Public Schools, Jill Murray Grady, Esq.*, Newtonville, MA, for the Employer.

ISSUES

Is the grievance arbitrable?

If so, did the School Committee violate Article 19 of the Unit A CBA or Article 3 of Unit C CBA by failing to assign a full-time kindergarten aide to each kindergarten classroom with 14 or more students for the 2023-2024 school year?

If so, what shall be the remedy?

BACKGROUND

The Newton Public Schools is a K-12 school district with approximately 12,000 students of which about 5,000 are elementary school students. There are two high schools, four middle schools, 15 elementary schools, and some special secondary programs located outside the main high school. In 2023-24 there were 43 kindergarten classrooms.

The Newton Teachers Association (Association) represents various Newton School Committee (Newton) professional employees, including kindergarten teachers, who are included in a bargaining unit referred to as Unit A. It also represents teacher aides, sometimes called teacher assistants, in a separate bargaining unit, Unit C. On March 16, 2023, Newton School Committee chair Tamika Olszewski informed Association president, Michael Zilles that the School Committee would "likely" be unable to meet the minimum staffing provisions included in the Unit C contract for the 2023-2024 school year because Newton voters rejected a Proposition 2 ½ budget override for the 2023-24 fiscal year. Ms. Olszewski also stated that the Unit C contract excluded the kindergarten staffing provision from arbitration as the issue was a "level of service issue" not covered by a bargaining obligation under Massachusetts law. She invited the Association to participate in "impact bargaining," which the Association rejected. Eight days later it filed grievances with the School Committee contending that it violated the Unit A and Unit C contracts when it failed to assign one kindergarten aide to each kindergarten classroom with 14 or more students.

The Association's grievances were filed under the September 1, 2020, to August 31, 2023, Unit A and Unit C contracts and they claimed a violation of Article 19, Section 2 of the Unit A contract and Article 3, Section 6 of the Unit C contract. These provisions state that, "Every kindergarten classroom with fourteen (14) or more students shall be assigned at least one full-time Category 1

Kindergarten Teaching Assistant. This 'Teaching Assistant' shall be distinct from and in addition to any other special education aides that may be assigned to particular students in the classroom." The arbitration provision Unit C contract (but not the Unit A contract) also states:

> The following matters shall not be subject to the arbitration provisions of this Agreement:
>
> A. The exclusive determination of the Committee as to the level of services to be provided in a given school year by Teacher Aides, including any changes in the level of service at any time during the school year.
>
> B. The exclusive determination of the Committee and/or Superintendent and/or Principal as to the form, manner and deployment of Teacher Aides in assignments based on the needs of the system.
>
> C. Initial and subsequent appointment conditions, assignments and transfer of Teacher Aides.

On April 11, 2023, Newton's Director of Human Resources & Staffing Martine Albama denied the Association's grievances. She reasoned that they were premature as they were filed during the 2022-2023 school year at which time each kindergarten class with 14 or more students was staffed with a full-time teacher aide. Director Albama also opined that level of services was a nondelegable managerial prerogative under Massachusetts law and that because of a budget shortfall the School Committee was required to make various service cuts, including teacher aide positions. The grievances were advanced to the School Committee who denied it on the same basis as Director Albama, and on May 22, 2023, the Association submitted a demand for arbitration with the American Arbitration Association. The position that the Association grievances were procedurally defective as being untimely has not been argued by Newton at hearing nor in its brief and is not a consideration in this matter.

History of the Kindergarten Aides

The essential facts of kindergarten classes in the Newton public schools and the use of teacher aides in those classes are not in dispute. From at least 2010 to 2019 Newton kindergarten teachers were full-time teachers. They had students from the start of school day to mid-day except for one day a week when all elementary students were released early. One half of the kindergarten students would remain with their teacher for two days in the week and the other half for the other two days, leaving the teacher with approximately half as many students in the afternoon as in the morning. During this "hybrid" scheduling, there were no aides assisting kindergarten teachers, except for aides for special needs children which the Association and Committee recognize are aides not included in this dispute.

In 2018 Newton decided to have full-time kindergarten for students to be implemented in school year 2019-20. The Association and Committee contracts were to expire at the end of the 2018-19 school year and the Association met with the kindergarten teachers to discuss the impact of having more students in the afternoon than what they were accustomed to under the hybrid schedule. The kindergarten teachers expressed a need for teacher aide assistance so that they could continue to educate students as they had been, including small group instruction in the afternoon when they had fewer students than in the morning.

There was a need to resolve the impact of full-day kindergarten on the kindergarten teachers prior to the 2019-20 school year as Newton had to plan for the transition. So, bargaining for the successor contracts to the ones expiring at the end of the 2018-2019 school year began but it focused on the kindergarten issue rather than on other contractual matters. The Association proposed various changes to accommodate the kindergarten teachers' suggestions, but ultimately it and the School Committee agreed to a salary category, hours of work, and planning

time for kindergarten aides, and a stipend for teacher classroom materials and the inclusion of full-time kindergarten aides for classes of 14 or more students. The agreements were implemented on September 1, 2019, and ultimately they were integrated into the Unit A and Unit C successor agreements that were negotiated for the one-year period, September 1, 2019, through August 31, 2020, and they were continued in the 2020-2023 contracts. As of the first day of hearing, October 19, 2023, the School Committee and the Association had not reached agreement on successor contracts to the expired 2020-23 agreements and they were in impasse mediation.

Newton implemented and complied with the negotiated ratio until the 2023-2024 school year when it reduced the number of kindergarten aides from one for each class of at least 14 students to one for every two classrooms. The reduction of kindergarten aides was occasioned by a projected $4.5 million operational budget shortfall and the failure of Newton voters to adopt the 2 ½ percent operating override in March 2023. Massachusetts' municipalities can only raise their tax levies by 2 ½ percent unless there is a new development in the community or voters approve a tax levy greater than 2 ½ percent.

As a result of the failure to achieve the operating override the School Committee cut 15.38 full-time equivalent (FTE) kindergarten aides, which, according to the Association president Mike Zilles, because Newton considered aides as 40-hour employees when they worked 34 hours, more than the 15.38 aides actually lost their jobs. In 2023-24, in at least one of Newton's 15 elementary schools, Underwood, one aide is shared between two classrooms.

Assistant Superintendent for Elementary Education Aysha Farag was part of a group of Newton school administrators that were involved in the annual school committee budget process and she was part of the committee that developed the 2023-24 district budget. In the spring 2023 the committee was aware of the $4.5

million budget shortfall for the 2023-24 budget and the need to seek the 2 ½ percent override. In developing the budget the committee proposed several staff and program cuts which included a $1.2 million reduction in elementary education costs. Some of those proposed cuts were restored, others were not, including the proposal to reduce kindergarten aides from the one-to-one classroom ratio to one for two classrooms, which went into effect in the 2023-24 school year.

Though the number of kindergarten aide FTEs was reduced in the 2023-24 school year, according to Assistant Superintendent Farag, despite the 15.3 FTE teacher aide reduction, the majority of kindergarten aides retained employment with Newton as those who wished to continue to work were placed in other Newton positions.

ARGUMENT

Newton contends that the Association's grievance is not arbitrable under the Unit C's contract as it clearly excludes the kindergarten staffing issue from arbitral review. Further, Newton argues that the Association cannot use the Unit A contract, which does not include an arbitral exclusion as does the Unit C agreement, to force compliance with the Unit C's staffing level. At hearing Newton also asserted that federal labor law as incorporated into Massachusetts public sector labor law (G.L. chapter 150E) precluded arbitration of the Association's grievances because the contracts did not contain a continuation provision, the staffing provision was not the type of provision that by law had to be honored, and because the staffing issue did not arise during the 2020-23 agreement but only when during the 2023-24 school year when Newton implemented the reduction in kindergarten aides. However, in its post-hearing brief Newton withdraw this last argument because after the December hearing the parties reached agreement on a successor contract which Newton says moots its argument that the kindergarten aide provisions did not have to be honored after the expiration of the 2020-23 contracts.

According to Newton, Unit C's contract arbitral exclusion of the kindergarten aide provision is clear on its face, is specific, is a non-mandatory subject of bargaining under Massachusetts law and is language contrary to the general presumption of arbitrability. Moreover, Newton points to other Unit C language limiting the arbitrator from applying a different interpretation to the arbitral exclusion language. One provision limits the arbitrator from altering, adding to, or detracting from any contract provision. Another restricts the arbitrator from rendering a decision inconsistent with any contract term. And the arbitrator lacks authority to enforce any provision that is within the exclusive authority of the school committee, or where its decision is final and binding. Newton also emphasizes that the Association's arbitration demand did not attach the Unit C contract and the Association contended at hearing that the dispute was primarily one of teacher work load. These, says Newton, show that the Association also understands that the language excluding from arbitration Unit C's aide-to-teacher ratio is not arbitrable.

Newton relies on *Town of Danvers,* 3 MLC 1559, 1573 (1977) for its insistence that the at-issue staff provisions are non-mandatory subjects of bargaining. There the Massachusetts Labor Relations Commission (LRC) reviewed a firefighter union's proposal that would mandate the number of personnel to be on duty. The LRC held that the union's demand was a permissive subject of bargaining, not a mandatory one, as it would restrict the employer from determining the quantity of fire service. Newton points out that the LRC made a distinction in *Town of Danvers* between the level of service a public employer may provide and bargaining the impact of that decision. It further stresses that the kindergarten aide language is, as in *Town of Danvers*, a "level of service" provision as it too requires a number of employees to be on duty.

Newton's argument that the Association cannot negotiate and thus enforce contract rights and benefits for those in another unit that it represents includes its inability to enforce Unit C's level of staffing requirement. It relies on G.L. c. 150 §5 which limits a bargaining agent's exclusive representation to only those in its bargaining unit and imposes its duty of representation to only those workers in that unit. It points to *Chelmsford School Administrators Association,* 8 MLC 151 (1981) quoting from *Saugus School Committee,* 7 MLC 1849, 1850 (1981) and *National Ass'n of Government Employees,* 35 MLC 163, 168 (2009) for its position that conditions of employment for employees are controlled by a unit's contract and not by any arrangement with the employer outside that contract and that an employer is not free to apply the terms of one bargaining unit to employees in another.

In *City of Boston,* 16 MLC 1437 (1989) a unit of interns and residents submitted a proposal regarding "medical support services." The LRC in an advisory opinion held that because of the unique circumstances of the medical personnel's obligation to provide services with specific standards of care, the unit's proposal raised issue with a direct impact on their terms and conditions of employment. Newton highlights that the LRC found in *City of Boston* unique conditions underlying its exceptional finding that interns and residents were entitled to negotiate subjects that generally would be non-mandatory subjects of bargaining. Newton also underscores that the LRC found in *City of Boston* that the medical officers were not permitted to insist on bargaining elements of ancillary services that did not have a direct impact on their working conditions including the staffing conditions of non-unit employees, specifically the number of laboratory technicians that were to be employed.

Newton suggests that the above referenced cases support a finding that the Association is not permitted to allow Unit A to negotiate staffing levels or levels of services for Unit C aides any more than it is free to demand to have a number of custodians for classroom work, who are in another bargaining unit, by merely

asserting that the custodians' terms of employment affect Unit A members' workloads. And Newton contends that the Association cannot enforce through arbitration Unit A's contractual kindergarten aide staffing level language by labeling it, as it did at hearing, a matter of its members' "workload." Newton adds that the Association cannot rely on the existence of Unit C's arbitration exclusion language and the absence of the same or similar language in Unit A contract as evidence that its grievance may *not* be arbitrable under the Unit C agreement but is under Unit A's.

Newton also maintains that even if the grievances are arbitrable, it acted in good faith as it respected Unit C's staffing provision until March 2023 when the voters rejected the 2 ½ proposition. And it points out that it made reductions in numerous program and staff including the elimination of elementary administrative positions. And when there were "circuit breaker" funds available in fiscal year 2023, it carried the funds over as a reserve to avoid the 2023 budget shortfalls and as an anticipation of the costs of the Association's successor agreements to those that expired in 2023.

Newton avers that it offered the opportunity for the Association to bargain the impact of the kindergarten staff cuts, but it refused, deciding to move its grievances to arbitration. It further suggests that any impact of the loss on aides on kindergarten teachers' workloads, or its impact on their performance evaluations, as kindergarten teacher Solof testified, could have been addressed in impact bargaining, which it contends was the appropriate avenue to resolve the Association's concerns.

The Association makes two arguments in response to Newton's position that the kindergarten aide language in both agreements is not subject to arbitration. First, it contends that Newton's decision to move to a full-day kindergarten program was *the* "level of service" decision, which the Association did not demand to

negotiate, and the bargained language to provide full-time aides for kindergarten classes with 14 or more students was merely the result of impact bargaining. It recognizes that there are managerial decisions reserved to a public employer, but it argues that there is frequently tension between the employer's duty to bargain and its right to make certain unilateral choices and that these two principles need to be reconciled.

Under *City of Somerville v Somerville Mun. Employees Ass'n,* 451 Mass. 493, 497 (2008), a proposal that constitutes intrusion into an employer's exclusive authority is impermissible if it creates a material conflict with the employer's reserved right and to be material it must "usurp the discretionary power granted by the Legislature to a public authority that, by statute, cannot be delegated to another." *Id* at 497. But the Association stresses that the employer must balance its rights while complying with its duty to bargain. In this balancing act between management prerogative and the duty to bargain the Association, in reliance on *Boston Sch. Comm.,* 3 MLC 1603, 1607 (1977), argues that the analysis is whether the "predominant effect" of negotiations has a "limited or speculative impact on management policy or whether the predominant effect is upon the level or type of government services with only a side effect upon employees."

Under this analysis the Association maintains that the Massachusetts courts have found various staffing proposals that did not conflict with management's alleged non-delegable authority. For example, in *Bd. of Higher Educ. Comm. Employ. Rel. Bd.* 483 Mass. 310, 319 (2019) the Supreme Judicial Court (SJC) of Massachusetts held that a contract provision that placed a cap on the percentage of courses that could be taught by part-time faculty did not interfere with the nondelegable statutory authority of State college boards of trustees to appoint, dismiss, and promote personnel and did not materially conflict with the colleges nondelegable authority to set educational policy. Similarly, the contractual

requirement to hire substitute teachers to replace absent regular teachers was held a proper subject of negotiations. *BTU, Local 66, 370 Mass. at 462-63.*

The Association maintains that *BTU Local 66* is instructive because the SJC held that the requirement to hire substitutes for classroom coverage was a proper subject for bargaining because hiring substitutes was the way that parties agreed to maintain class size and workload, which were also proper subjects of bargaining and were negotiated provisions of the collective bargaining agreement. The SJC explained that the school committee did not change its "view as to proper class size or teaching load, nor did it determine that substitute teachers were unnecessary or unwanted as a matter of managerial prerogative or education policy." Thus, the negotiated substitute provision was enforceable as it was a method of supporting class size and a teaching load policy, (if not enhancing them) and did not contradict the school committee's "exercise of its exclusive managerial judgment of its right to make educational policy determinations."

The Association contends that the at-issue aide ratios are similar to the above cited cases, and that the ratios did not infringe upon Newton's decision to move to full-day kindergarten. Bargaining the impact of Newton's decision resulted in establishing conditions of employment for the kindergarten teachers and the aides, including their planning time, hours of work, and the issue here: the assistance that would be provided kindergarten teachers as their workloads were impacted by the change. The aide-ratio provision, according to the Association, is not an impermissible provision as Newton claims, as it is not a "level of service" clause, as Newton's non-delegability rights apply only "as far as necessary to preserve the employer's ability to carry out what is mandated explicitly by statute, tradition, or policy." The Association claims that Newton's right to determine its policy of full-time kindergarten was fully maintained as the contractual provisions did not restrict Newton from adopting its full-day kindergarten policy, nor from rescinding it.

Further, the Association calls attention to decisions where staffing decisions have been held nondelegable but, largely, because they were the focus of management's right to hire and deploy staff or where public safety or law enforcement priorities were a concern. For example, in *Sch. Comm. Of Holbrook Educ. Ass'n,* 395 Mass. 651, 657 (1985), an arbitrator exceeded his powers by ordering the recall of a teacher as a school adjustment counselor as the recall was like an appointment decision which was within the exclusive authority of the school committee. And, in *Boston Police Patrolmen's Ass'n,* 403 Mass. 680, 685 (1989) the reduction of two police officers to a police vehicle to one per car was held nondelegable and beyond an arbitrator's authority to enforce. The Association contends that these cases are dissimilar to the question of whether the use of aides in kindergarten classes is an unenforceable contract provision.

The Association also has addressed Newton's contention that the grievances are not arbitrable under the terms of the Unit C contract. Notwithstanding the apparent language of that contract, the Association posits that the exclusion language must be viewed in context, and the improbability that the parties intended it to be unenforceable. The first provision of the exclusion list relates to the "level of services" to be provided by the aides, but the Association suggests that the provision refers to the number of teacher aides in the district which is not what this case is about. The second part of the provision which excludes from arbitration the "form, manner and deployment" of the aides "based on the needs of the system" must be read in the context of the Association's and Newton's joint interest in full-day kindergarten and the support that the arbitration process gives to that mutual interest. The last component of the exclusion list removes from arbitration initial appointment conditions, assignments and transfers which is in inapplicable in this matter. The kindergarten-aide contractual requirement does not restrict appointment decisions or where staff is employed.

The Association continues that even if the kindergarten-aide ratio provision is not arbitrable under the Unit C agreement, because the Unit A contract does not have the arbitration exclusion language, the ratio is enforceable under that contract. Moreover, enforcing it under either contract ensures compliance with ensuring adequate aide support to the teachers with 14 or more students. Finding the teacher-aide provision under the Unit C contract not arbitrable may limit remedies for the aides but it does not render the grievance unenforceable.

The Association draws attention to the fact that the merits of this case are not in dispute. The language requiring the kindergarten aides is unambiguous and its meaning is not in dispute. Nor is it in dispute that commencing with the 2023 school year Newton did not assign the aides called for under both the Unit A and C agreements. As possible remedies, it requests a cease-and-desist order and that any aide that was excessed or had their hours reduced should be made whole. It also requests that this arbitrator award a remedy that he deems appropriate and that he retain jurisdiction for sixty days over the remedy question.

DISCUSSION

The issue is this case is whether the provisions in the Unit A and Unit C contracts which require Newton to provide aides to kindergarten classes with 14 or more students are arbitrable. The burden of showing that they are not falls to Newton as there is a general presumption of arbitrability and Newton is the party that has raised the issue. As there is no dispute that Newton did not comply with the teacher-aide ratio provisions in the 2023-24 school year, if this matter is found arbitrable the remaining question is what, if any, remedy is appropriate.

Whether the language is arbitrable under the Unit C agreement is both a contractual and legal question. However, there is no need to delve into whether the aide provision is legally barred from enforcement under the Unit C agreement

because I find that it is contractually barred. The provision, Article 3, § 6, is unambiguous but so also is the language in Article 6, § 7, which excludes from arbitration the "level of services to be provided in a given school year by Teacher Aides." Moreover, even if the mandated employment of teacher aides in the kindergarten classes were a mandatory or a permissive subject of bargaining, the parties chose to exclude it from arbitration.

The Association's belief that it is improbable that Newton and the Association intended to exclude from the Unit C agreement enforcement of the provision under that contract's arbitration provision is belied by the clear language of exclusion in that agreement. Further, the Associations' argument that the wording "level of service" in the arbitral exclusion language more likely refers to the total number of aides that Newton hires and does not refer to those provided just in kindergarten classes is not supported by any evidence and is not a reasonable position. And enforcing the kindergarten aide provision through the Unit C arbitration provision may, as the Association argues, support the full-day kindergarten policy but the parties chose not to use the Unit C contract to that end.

As the teacher aide-ratio provision in Unit C's agreement is excluded from enforcement under its arbitration provision the Association's requested remedy to make whole any teacher aide who was excessed or lost hours by the failure of Newton to comply with its provision is denied. Further, the make whole remedy for the aides, or any other remedy for them, is unavailable under Unit A's agreement even if the teacher-aide ratio is arbitrable under that agreement as it cannot proscribe terms and conditions of employment for those in another bargaining unit. Newton is correct that the teachers cannot bargain conditions of employment for the aides even though both are represented by the same union and the Association bargains both contracts jointly with Newton.

However, Newton is not correct that Unit A is precluded from arbitrating a provision in its contract because the same provision is in the Unit C agreement and there it is barred from arbitration. The enforcement of the teacher aide-ratio under the teacher agreement has a different purpose than it would under the Unit C agreement. Newton's argument would be compelling if the teachers were attempting to secure a benefit specific to the aides, *e.g.*, a guarantee of their employment, by using arbitration in their agreement when arbitration was not accessible in the Unit C contract. But the Association is not trying to secure a benefit for the aides through the Unit A's arbitration provision. The Association, through its Unit A contract, is only attempting to enforce the benefit of the teachers having aide assistance in their kindergarten classes. That the enforcement of their entitlement to aides may have a residual, or secondary, guarantee of employment for the aides, or any other benefit, does not eviscerate the teachers' contractual right to arbitrate under their agreement whether they were entitled to the mandated aide assistance.

A contract interpretation analysis of the inclusion of the arbitration bar in the one agreement but not the other would weigh in favor of the parties' intention to exclude from arbitration the teacher-aide ratio under the Unit C agreement but not under the Unit A agreement. If this were only a contract interpretation case the standard "*exlusio unius inclusio alterius,*" or the expression of one thing is to the exclusion of the other, absent any other evidence, would likely show an intention to exclude the provision from the Unit C agreement but not under Unit A's. This would not be so if the contracts were between two different employers and different bargaining agents. But here where the employer and the union are the same, and the two contracts are negotiated together, that one contract excludes arbitration of the teacher-aide ratio and that the other does not would likely be a compelling factor in deciding the arbitrability issue under the Unit A agreement.

But if, as Newton contends, the teacher-aide ratio is a "level of service" issue that is a management prerogative, and not delegable, even a provision that specifically stated that the teacher-aide ratio was arbitrable would not likely survive court or agency challenge. Thus, the issue of whether the teacher-aide ratio under the Unit A agreement is substantively arbitrable is a legal analysis, not a contractual one.

In *Town of Danvers and Local 2038,* 3 MLC 1560, 1563 (1977), the LRC recognized precedents under the National Labor Relations Act (NLRA) that the scope of bargaining includes mandatory subjects of bargaining, permissive subjects which the parties could bargain to the point of impasse and "the narrow area of illegal subjects" where negotiations were prohibited. Mandatory and permissive subjects of negotiations, which the LRC characterized as "proper" subjects of bargaining, that are included in a collective bargaining agreement are enforceable provisions, including areas "of managerial prerogatives over which a school committee need not bargain, but where agreements, if reached, are enforceable." *id, at 1569.* See also, *id at 1569, fn 12.*

Town of Danvers recognized Massachusetts court decisions, based on challenges to arbitration awards, holding that certain arbitral remedies were unenforceable. For example, it recognized that an arbitrator could not grant tenure to a teacher for a school committee violation of a negotiated evaluation procedure but other remedies were available including reinstatement. *Boston Teachers Union, Local 66 . School Committee of Boston,* Mass. Adv. Sh. (1976) 1515, 350 N.E. 2d 707 (1976). And in *School Committee of Braintree v. Raymond,* Mass. Adv. Sh. (1976), 343 N.E. 2d 145 and *School Committee of Hanover v. Curry,* Mass. Adv. Sh. (1976) 396, 343 N.E. 2d 144, the Supreme Judicial Court held that an arbitrator's remedy re-establishing a supervisory position that had been eliminated for educational policy reasons was beyond the arbitrator's authority.

However, the LRC in *Town of Danvers* also recognized the holding in *Boston Teachers Union, id* at 1569, 1570, that class size and the use of substitute teachers were subjects which did not remove school committees right to hold these as matters of educational policy. And the LRC held that "[w]hen, however, an agreement is made on these subjects consistent with the committee's view of . . . educational policy, the terms of that agreement may be enforced where there has been no change in educational policy . . . ."

In discerning whether a contract provision is an illegal provision and thus unenforceable, *Town of Danvers* recognized that there were management decisions that public employers did not have to subject to bargaining because they did not directly impact terms and conditions of employment. However, the LRC also held that the union's proposal requiring a certain level of service, *i.e.*, the number of firefighters on duty at any one time, was a *permissive* subject of bargaining despite it locking the Town into a certain level of service and not withstanding that the proposal was "an intrusion into the type of governmental decisions which should be reserved for the discretion of elected representatives . . . ." *id, at 1573.* Moreover, the LRC also held that the union's minimum staffing proposal was a permissive subject of negotiations even though it did not have any "direct impact on "workload" and had "far greater impact on the level of delivery of a public service . . ."

Newton relies substantially on *City of Boston,* 16 MLC 1437 (1989) for its position that the ratio of aides to kindergarten classes is an "ancillary services" provision which it says has been held to be an impermissive subject of bargaining. *City of Boston* is an advisory opinion that found that the City of Boston had a bargaining obligation to negotiate various medical support services pertinent to a bargaining unit of City residents and interns. For example, one union demand mandated the number of I.V. nurses to be on duty and another a requirement to maintain interpreter services to be available to bargaining unit members.

City of Boston held that the union's proposals were mandatory subjects of negotiations only because of the "unique circumstances presented by the house officers' professional and legal obligations to provide medical services in accordance with certain standards of care . . ." Newton holds *City of Boston* out as evidence that without such "unique circumstances," level of service language, such as how many aides shall be provided to kindergarten classes, is an unenforceable provision of a collective bargaining agreement. And thus, because there are no such "unique circumstances" for teachers as there were for the interns and residents, the teacher aide ratio is an unenforceable provision.

In *City of Boston* the MLC judged the negotiability of proposals intended for negotiations and not the enforceability of a proposal already part of a collective bargaining agreement. It recognized that certain level of service proposals may not be *mandatory* subjects of bargaining if there were no similar "unique circumstances" as existed with the interns and residents. But it did not advise that the level of service proposals that those bargaining unit members proposed were *prohibited* subjects of bargaining, which is the issue in the case between Newton and its teachers. The best that may be argued from *City of Boston* is that Newton had no duty to bargain the teacher-aide ratio in the first instance:

> "Generally an employer's decision concerning the performance of nonbargaining unit work is not a subject which *must be bargained* with the bargaining unit. Such a decision has relatively little direct impact on a bargaining unit and therefore the balance is struck against *requiring* the employer to bargain with the unit." (my emphasis) *id, 1437*

The burden of proof in this case requires Newton to show that the teacher aide ratio is an illegal, or prohibited subject of negotiations. To meet this burden it must show that the at-issue language is barred by statute, violates public policy, or otherwise is a non-delegable right to establish educational policy. Newton has not cited any statutory foundation for a finding that the teacher to aide provisions are

illegal. Rather it contends that how it operates it full-day kindergarten program is a non-delegable right and any restrictions on that right are unenforceable.

Under *Boston Sch. Committee*, 3 MLC 1603, the balance between managerial prerogatives and employees' entitlement to negotiate terms and conditions of employment hinges on whether "the predominant effect" of negotiations is directly upon the employment relationship with only a speculative impact on core management services or whether management's decision has a limited effect of conditions of employment. Determining this balance is aided by a review of existing MLC and court decisions cited by the parties that have drawn these lines. While there are no cited decisions determining the negotiability of a teacher-aide ratio, there are decisions involving contract provisions there are sufficient analogous to assist this arbitrator in determining the substantive arbitrability question.

Two decisions favoring the enforcement of the teacher to aide-ratio language are *Bd of Higher Educ v Comm. Employ. Rel. Bd., 483 Mass. 310 (2019)* (cap on the percentage of courses taught by part-time faculty held enforceable), and *BTU, Local 66 v. Sch. Comm. Of Boston, 370 Mass.* (hiring substitutes for absent teachers and class size enforceable and did not infringe on school committee's prerogative to determine policy nor contravene statutory limitations). Particularly noteworthy in *BTU, Local 66* is the Court's conclusion that there was no change in the educational policy underlying the provisions as the school committee only ignored the two contract provisions because of financial restraints imposed by the mayor. It did not change its view of proper class sizes nor that substitutes were unwanted or unnecessary as a matter of educational policy, and in fact its policies were enhanced by class size limits and use of substitutes.

BTU, Local 66 is instructive because Newton has not changed its policy of either the desire to run full-day kindergarten nor its recognition of the value of the aide assistance that it bargained with Unit A. Its grievance responses and

Assistant Superintendent Farag's testimony confirm that the only reason for its repudiation of the teacher aide-ratio provision was the financial constraint placed on it because of its failure to achieve the 2 ½ percent override.

The Association convincingly argues that the Unit A teacher aide-ratio did not infringe on Newton's right to determine educational policy as Newton continued to support full-day kindergarten. The requirement for full-time aides was a provision aimed at helping the teachers of those classes and did not impinge on Newton's prerogative to set education policy.

Moreover, Newton has not shown that the teacher aide-ratio violated any statute, nor has it shown any basis for the conclusion that its decision was non-delegable. The "pre-dominant effect" of the at-issue language was on the workload of the kindergarten teachers and to provide them with assistance needed to enhance Newton's full-day kindergarten policy. The number of aides negotiated did not "usurp" whatever power Newton had to establish or dissolve full-day kindergarten, and as in *BTU, Local 66,* the negotiated assistance actually enhanced its policy.

Further, there seems little distinction between a provision that requires the employment of substitutes for absent teachers and providing aides for kindergarten teachers. Both concern teachers' workloads which, like class size, are in Massachusetts mandatory subjects of bargaining.

The holding in *Bd of Higher Educ v Comm. Employ. Rel. Bd.* further demonstrates the enforceability of a contract provision if the "pre-dominate effect" of the provision was on the workload of the bargaining unit members impacted by it, and if the nondelegable management prerogative assertion was based only on laws granting "general authority [on a school committee] over the operation and maintenance of public schools." *School Comm. Of Newton v. Labor Relations Comm'n,* 388 Mass. 557, 564-566 (1983). The court held, citing to *Lynn, 43 Mass.*

App. Ct, at 180, that it would not enforce a contract provision only where an employer acts "under the authority of a statute or law authorizing the employer to perform a specific, narrow function or, alternatively acts with reference to a statute specific in purpose that would be undermined if the employer's freedom of action were compromised by the collective bargaining process."

Again, Newton has not cited any "specific, narrow function" or specific statue that would be undermined by the requirement to comply with its agreement to provide the contractually mandated aides. The capping of courses taught by part-time employees was intended to assist full-time faculty in managing their workload which is exactly the intention of the teacher aide-ratio language.

Thus, for all the above reasons I find that the Unit A teacher aide ratio provision arbitrable.

The next issue is what, if any, remedy is appropriate. The Association requests a cease-and-desist order requiring compliance with the requirement to provide full-time aides to kindergarten classes with 14 or more students, a make whole remedy for the aides who were laid off, and any other remedy deemed appropriate, with this arbitrator retaining jurisdiction to address any remedy disputes. I have already dismissed a make whole remedy for the aides and I find that a cease-and-desist order is proper, but only commencing with the 2024-2025 school year. It would be too disruptive this late in the school year to require Newton to hire sufficient aides to fulfill its teacher aide-ratio obligation for the current school year.

This is an unusual case as there, as the Association seems to recognize, no appropriate remedy other than the cease-and-desist order. The loss of the aide assistance put an additional burden on certain kindergarten teachers but there is no way to quantify that impact for each teacher affected. And even if quantifiable

there is no appropriate remedy to compensate them for the additional burden they incurred. And for the reasons previously stated, there is no remedy for the aides who may have lost employment as I have found Unit C teacher aide-ratio provision not arbitrable. Finally, I reject the Association's suggestion that I retain jurisdiction to resolve any remedy disputes that arise as the only remedy I find appropriate is the cease-and-desist order whose enforcement rests elsewhere.

AWARD

The grievance filed under the Unit A agreement is arbitrable. The grievance filed under the Unit C Agreement is not arbitrable.

The Newton School Committee violate Article 19 of the Unit A CBA by failing to assign a full-time kindergarten aide to each kindergarten classroom with 14 or more students for the 2023-2024 school year

The Newton School Committee shall cease and desist from failing to comply with Article 19 of the Unit A CBA, effective with the beginning of the 2023-2024 school year.

Jeffrey R. Cassidy
Arbitrator

April 24, 2024

I, Jeffrey R. Cassidy, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument which is my Award.

Jeffrey R. Cassidy
April 24, 2024