



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**FREEDOM SCHOOL EMPLOYEES
ASSOCIATION, NEA-NH**

PETITIONER

and

CASE NO. E-0059-1
DECISION NO. 2008-207

FREEDOM SCHOOL DISTRICT

APPEARANCES

Representing: Freedom School Employees Association, NEA-NH
James F. Allmendinger, Esq., NEA/NH, Concord, New Hampshire

Representing: Freedom School District
Jay C. Boynton, Esq., Andover, New Hampshire

BACKGROUND

The Freedom School Employees Association, NEA-NH (the "Association") filed the above captioned Modification Petition on August 25, 2008 seeking to add the position of paraprofessional to an existing bargaining unit consisting of the following positions per the June 16, 1993 certification:

Classroom teachers, Chapter 1/Reading Specialist, Special Ed Teacher and School Secretary.

The District filed its objections to the Association's petition on September 10, 2008, claiming the Association does not meet the change in circumstances requirement imposed by Pub 302.05, that there is an insufficient community of interest, that teachers supervise the positions the Association seeks to add, and the paraprofessionals are currently covered by a comprehensive and fair personnel agreement.

The undersigned hearing officer conducted a hearing on October 6, 2008 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. During the course of the hearing the Association moved to amend its petition to clarify that it was seeking to add the positions of aid as well as paraprofessional to the existing bargaining unit. Over the District's objection, the amendment was allowed, and the District was provided with the opportunity to request a continuance of the hearing on the basis of the amendment but the District declined to seek a continuance. At the conclusion of evidence, the record was closed and the case submitted for decision.

FINDINGS OF FACT

1. The Freedom School District is a public employer subject to the provisions of RSA 273-A.
2. The Freedom School Employees' Association, NEA-NH is the certified exclusive representative of the existing bargaining unit covering certain elementary school employees which the Association now seeks to modify. The Freedom School Employees' Association affiliated with the NEA-NH in April, 2008. *See* PELRB Decision No. 2008-085 and Decision No. 2008-086.

3. The original petition for certification which resulted in the existing bargaining unit was filed on December 3, 1992. *See Freedom School Employees Association and Freedom School District*, PELRB Case No. T-0408. The composition of the proposed bargaining unit was contested by the School District, resulting in a hearing and PELRB Decision No. 93-57. Following an election, the PELRB issued the existing certification. The current case is the first modification proceeding since that time.

4. The District and the Association are parties to a July 1, 2005 to June 30, 2009 collective bargaining agreement (the "2005-09 CBA") negotiated prior to the Association's affiliation with the NEA-NH. The recognition clause in this contract describes the Association as the exclusive representative for "certified or professional staff."

5. The term "paraprofessional" is used by the parties to describe an employee who has obtained a State Department of Education certification, such as a Paraeducator I or II. *See* District Exhibit 5. The term "ad" is used by the parties to describe an employee who like paraprofessional works with students and supports teachers but who does not have a certification.

6. Teachers, paraprofessionals, and aids all work 180 days per year in the elementary school building, although teachers work an additional 5 days devoted to school and educational work. *See* Association Exhibits 1 and 2. These District employees interact with each other on a daily basis for the common purpose of educating children.

7. Under current arrangements, teachers are paid a salary and paraprofessionals and aids are paid hourly. Full time teachers, paraprofessionals, and aids are eligible for health insurance, although teachers contribute a higher percentage to the cost of such coverage. There are other similarities in terms of the kinds of benefits provided to teachers under the 2005-09 CBA and to paraprofessionals and aids under the personnel agreement. *See* District Exhibits 4 and 7.

8. Like teachers, paraprofessionals and aids attend faculty meetings and some teacher workshops. They have also attended parent conferences on occasion.

9. There are differences in the extent of post-secondary education obtained by teachers and paraprofessionals and aids.

10. At the time the existing bargaining unit certification issued in 1993 there were no full time or part time paraprofessionals and aids with the exception of special one on one aids. The current elementary school paraprofessionals and aids work generally with the student population and in support of teachers. Paraprofessionals and aids generally have the same duties and responsibilities.

11. The Federal No Child Left Behind Act became effective in approximately 2004, and the "highly qualified" standard is one of the reasons former aids obtained state certifications as Paraeducators, although the No Child Left Behind Act does not equate "highly qualified" with the Paraeducator I or II certifications.

12. Teachers do not play a strong role in supervising or directing paraprofessionals or aids, and are not responsible for hiring, firing, evaluation, or discipline of paraprofessionals or aids. These matters are the responsibility of the school principal, the superintendent of schools, and the school board.

13. The school secretary position referenced in the original certification has been eliminated and replaced in part by the administrative assistant position.

DECISION

DECISION SUMMARY

The Association's modification petition is granted. There is sufficient evidence of a change in circumstances since the 1993 proceedings that resulted in the current certification and

the Pub 302.05 (b)(2) bar does not apply to this case. There is a sufficient community of interest between paraprofessionals and aids and the positions covered by the current bargaining unit and teachers do not qualify as supervisors of paraprofessionals or aids within the meaning of RSA 273-A:8, II.

JURISDICTION

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8 and Pub 302.05.

DISCUSSION

Pub 302.05 provides:

(a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

The role, function and number of paralegals and aids in the Freedom elementary school has increased since the 1993 proceedings that resulted in the existing bargaining unit certification. At the time of the original certification proceedings in 1993 the District did not employ paraprofessionals or aids except to the extent necessary to provide special one on one support to a student. Currently there are four paraprofessionals and aids regularly employed during the school year and they have more general responsibilities and duties than was true of a one on one aid in 1993. Additionally, the Federal No Child Left Behind Act has resulted in aids

obtaining formal certification as Paraeducators I or II from the State Department of Education. These facts are sufficient to constitute the requisite change "in circumstances surrounding the formation of an existing bargaining unit" as required under Pub 302.05 (a).

The Pub 302.05 (b)(2) bar does not apply unless the underlying bargaining unit was negotiated by the parties. For purposes of Pub 302.05 (b)(2), the phrase "underlying bargaining unit" refers to the bargaining unit described in the board's certification, not position descriptions contained in a recognition clause which conflicts with the board's existing certification. Underlying bargaining units can be negotiated and composition agreements documented in certification or modification proceedings. See Pub 302.01; *Town of Milford and AFSCME Local 3657, Milford Police Employees*, PELRB Decision No. 2007-183; *New England Police Benevolent Association, Inc. Local 50 and 55 and State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169. In this case, the existing Freedom School Employees Association bargaining unit was not negotiated. It was determined by the board after contested proceedings that resulted in PELRB Decision No. 93-57. Accordingly, the Pub 302.05 (b)(2) bar does not apply. The District's related argument that the Association is required to raise and address modification issues at the bargaining table either in place of or as a condition precedent to these proceedings is without merit, although the Association does have an obligation to confer with the District about composition issues in connection with a board modification proceeding. It may be that in connection with collective bargaining the parties become aware of circumstances which require modification of the existing bargaining unit certification, in which case the parties must file a modification petition in order to have the existing board certification changed.

The District also contends that there is an insufficient community of interest between teachers and paraprofessionals and aids. In this case, teachers, paraprofessionals and aids all work in the same building, have the same daily work schedule, work 180 days per year, have daily interaction with each other and with students for the purpose of educating students, enjoy similar categories of benefits, and work under the direction and control of the principal. There are differences between their current respective wage and benefit structure, and teachers as a group have more extensive post-secondary school education and are all certified and are required to work an additional 5 "in service" days per year. The Association has established a sufficient community of interest among teachers, paraprofessionals and aids based upon the community of interest criteria set forth in RSA 273-A:8, I and Pub 302.02, notwithstanding the points made by the District illustrating the various differences between the positions in dispute.

The District has also raised objections based upon the purported supervisory role of teachers. This requires evidence of meaningful and significant involvement in personnel areas such as hiring, firing, evaluation, discipline, as well as general supervisory authority. *See Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket, PELRB Decision No. 2008-127.* In this case teachers do not possess this level of authority over paraprofessionals and aids. Such matters are within the domain of the school principal in the first instance, subject to the review and involvement of the superintendent and the school board. Accordingly, the level of supervision the District attributes to teachers is insufficient to qualify them as supervisors within the meaning of RSA 273-A:8, II.

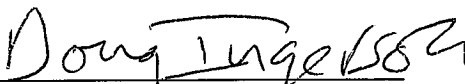
The existing personnel agreement, District Exhibit 7, which covers the positions of paraprofessionals and aids, among others, does not pose a legal bar to the Association's modification request. The Association's request to utilize the more general description of the

bargaining unit as consisting of all "professional and paraprofessional employees" is denied. Bargaining units should contain precise position descriptions when possible. The Association's petition is otherwise granted, and the board's 1993 certification shall be amended to describe the bargaining unit as follows:

Unit: The following Professional and Paraprofessional positions - Classroom teachers, Chapter 1/Reading Specialist, Special Ed Teacher, Paraprofessionals and Aids. Excluded: Administrative assistants, Principals.

So ordered.

October 13, 2008


Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

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