



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**BETHLEHEM EDUCATIONAL SUPPORT
PERSONNEL, NEA-NEW HAMPSHIRE**

PETITIONER

CASE NO. E-0093-1

and

DECISION NO. 2010-054

BETHLEHEM SCHOOL DISTRICT

RESPONDENT

APPEARANCES

Representing: Bethlehem Educational Support Personnel, NEA-New Hampshire
Jay Tolman, UniServe Director, NEA-New Hampshire

Representing: Bethlehem School District
Jay C. Boynton, Esq., Boynton Law Office
Andover, New Hampshire

BACKGROUND

Bethlehem Educational Support Personnel, NEA-New Hampshire (Union) filed a petition for certification on December 3, 2009. The Union seeks to represent a bargaining unit consisting of the following positions: Paraprofessionals, Food Service Employees, Custodians, Secretaries, and Library Assistant.

Bethlehem School District (District) filed objections to the petition for certification on December 17, 2009. The Town claims that the petition should be denied for the following reasons: (1) some of the employees in the bargaining unit proposed by the employee organization work under direct supervision of a member of an existing bargaining unit represented by the same employee organization; (2) some members of the proposed unit supervise and evaluate

other members; (3) the petition includes both certified and non-certified employees; (4) the Secretary and the Administrative Assistant are confidential employees; and (5) the members of the proposed bargaining unit lack a community of interest in so far as their employment contracts have evolved separately over the years with differing qualifications, terms of employment, compensation, work year, and benefits.

The undersigned hearing officer conducted a hearing on January 15, 2010 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request, the record was held open until February 1, 2010 to allow the parties to file post-hearing briefs. Both parties filed their briefs on February 1, 2010 at which time the record was closed.

FINDINGS OF FACT

1. The Bethlehem School District is a public employer as that term is defined in RSA 273-A:1, IX.

2. The Bethlehem Educational Support Personnel, NEA-New Hampshire is an employee organization seeking to be certified as the exclusive representative of a bargaining unit through a representation election pursuant to the provisions of RSA 273-A:10.

3. The proposed bargaining unit contains fifteen employees of the Bethlehem Elementary School.

4. The Bethlehem Elementary School is a small school.

5. All of the employees in the proposed bargaining unit work in the same building.

6. The Superintendent MacMillan testified that the Bethlehem Elementary School is a close-knit community, in which the employees help each other and work together to educate

students.

7. The Principal is the Bethlehem Elementary School's Administrative Officer. The Principal hands out the evaluation forms to the department evaluators. The completed evaluation forms are submitted to the Principal. The Principal, and not the department evaluators, relates the results of the evaluations to the employees. Neither the Principal nor the Superintendent has authority to hire or fire the Elementary School's employees. The Principal and the Superintendent can make recommendations regarding hiring, firing, or discipline but the final authority to hire, fire, or discipline the employees rests with the School Board.

8. Educational Support employees, including Cafeteria Staff, Maintenance Staff, Paraprofessionals, Secretaries, and Library Assistant, work together on various projects, including setting up annual concerts and graduations. The Paraprofessionals sometimes perform custodial work. Educational Support employees share a strong sense of community and work together to advance the common goal of educating students.

9. The Teachers, including Special Education Teachers, working at the Bethlehem Elementary School are members of an existing bargaining unit represented by the Bethlehem Education Association/NEA-NH.

10. The Paraprofessionals (formerly "Inclusion Assistants/Special Education Aides") work with both Special Education Teachers and Classroom Teachers. Paraprofessionals must be certified.

11. There are two Special Education Teachers at the school. They do not have authority to hire, fire, or discipline Paraprofessionals. One of the Special Education Teachers oversees the Paraprofessionals.

12. The evaluations of Paraprofessionals are conducted in the following manner: a Paraprofessional obtains a self-evaluation form from a folder on the computer, prints and completes the form, and submits the completed form to the Special Education Teacher; the Special Education Teacher takes the answers from the self-evaluation form and puts them into an evaluation form; and the Special Education Teacher discusses the evaluation with the Paraprofessional after which the evaluation form is sent to the Principal.

13. On the form entitled "Paraprofessional Evaluation" it is stated that

The following is a compilation of information including input gained from the classroom teachers, meetings, professional development participation, observations and teamwork.

14. There are two positions in the Bethlehem Elementary School Maintenance Department: the Director of Maintenance and the Custodian.

15. Ernest Ferland is the Director of Maintenance in the Bethlehem Elementary School. He has worked for the School District for 27 years.

16. On the employment contract of the Director of Maintenance it is indicated that his Job Title is Custodian and his Position is Custodian. The same designations are used on the employment contract of the Custodial Staff.

17. Seven years ago a Custodian was dismissed by the school administration. Mr. Ferland was the Director of Maintenance at that time but he was not aware that the administration intended to dismiss the Custodian and he provided no input into the dismissal decision.

18. Mr. Ferland is currently on the hiring committee pursuant to the Principal's request. He does not have authority to hire and has never hired or fired anyone.

19. Mr. Ferland fills out evaluation forms for the Custodian. He has no access to the evaluation forms. He receives an evaluation form from the Principal. After filling out the

evaluation form, he gives it to the Principal. Mr. Ferland has never returned a completed evaluation form, or related the results of the evaluation, to the Custodian.

20. The evaluation form contains a space for the Principal's comments and for the evaluated employee's comments. It is common for the Principal and for the evaluated employee to add comments after Mr. Ferland completes the evaluation form. The Principal does not inform Mr. Ferland when she adds comments to the evaluation form. Neither has Mr. Ferland ever been informed that the employee added comments to the evaluation form. Mr. Ferland's evaluations have never been used to hire or fire an employee.

21. There are two positions in the Bethlehem Elementary School Food Service Department: the Food Service Manager (also referred to as Cafeteria Manager) and the Cafeteria Assistant.

22. Cheryl Taber is the Food Service Manager. She has worked for the Bethlehem Elementary School for 9 years.

23. The Cafeteria Assistant was fired last year. Ms. Taber found out about it from the Principal. Ms. Taber was not asked for her input into the decision to terminate the Cafeteria Assistant and she was not involved in hiring of a new assistant. She has never been asked for her input into termination or hiring decisions.

24. Ms. Taber has not evaluated the Cafeteria Assistant since 2005 or 2006.

25. The Bethlehem Elementary School has two secretarial employees: the Administrative Assistant and the Secretary.

26. Personnel and disciplinary decisions, and the accompanying documentation, are generated at the School Board level and not at the Bethlehem Elementary School Principal level.

27. Decisions regarding collective bargaining negotiations and grievances involving the existing bargaining unit, and the accompanying documentation, are generated at the School Board level and not at the Bethlehem Elementary School Principal level.

DECISION

DECISION SUMMARY

There is a sufficient community of interest among the members of the proposed bargaining unit such that it is reasonable for the employees to negotiate jointly. The positions of Paraprofessional, Director of Maintenance, Food Service Manager, Administrative Assistant, and Secretary are included in the bargaining unit because the evidence is insufficient to prove that: (1) the Special Education Teacher, the Director of Maintenance, and the Food Service Manager are employees exercising supervisory authority involving significant exercise of discretion; and (2) the Administrative Assistant and the Secretary are confidential positions.

JURISDICTION

The PELRB has jurisdiction of all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of representation election pursuant to RSA 273-A:8, 273-A:10, and Pub 301.01.

DISCUSSION

The purpose of the Public Employee Labor Relations Act, RSA Chapter 273-A, is “to foster harmonious and cooperative relations between public employers and their employees”. See *Appeal of International Brotherhood of Police Officers*, 148 N.H. 194, 196 (2002) (citation omitted). “In establishing the PELRB, the legislature recognized the ‘right of public employees to organize and to be represented for the purpose of bargaining collectively with the state or any political subdivision thereof’ Laws 1975, 490:1.” *Id.* RSA 273-A:8, I vests the PELRB with the authority to determine the appropriate bargaining unit and certify the exclusive representative

thereof. “The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly.” *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995) (quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)). RSA 273-A:8, I provides that

the community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:

- (a) Employees with the same conditions of employment;
- (b) Employees with a history of workable and acceptable collective negotiations;
- (c) Employees in the same historic craft or profession;
- (d) Employees functioning within the same organizational unit.

The PELRB rules provide additional criteria for determining whether the community of interest exists:

- (1) A common geographic location of the proposed unit;
- (2) The presence of:
 - a. Common work rules and personnel practices; and
 - b. Common salary and fringe benefit structures; and
- (3) The self-felt community of interest among employees.

Pub 302.02 (b). In addition to considering the principle of community of interest, the PELRB also takes into account the effect of forming any particular bargaining unit on the efficiency of government operations and the potential for employees within the proposed bargaining unit to experience a division of loyalties between the public employer and the employees’ exclusive representative. See Pub 302.02 (c) (1) and (2). “[T]he statutory framework which guides PELRB decisions is flexible, and gives much discretion to the PELRB’s expertise. The statute and regulation require only that certain factors may be considered in determining whether a community of interest exists.” *Appeal of University System of New Hampshire*, 131 N.H. 368, 374 (1988). Under the statute and regulations, “the PELRB need not find each criterion satisfied

in order to find that a community of interest exists.” *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995).

In the present case, there is sufficient community of interest between the members of the proposed bargaining unit. The Bethlehem Elementary School is a small and close-knit community. The evidence, including the Superintendent’s testimony, demonstrates the existence of the strong self-felt community of interest among the employees. All of the employees in the proposed unit work in the same building and function within the same organizational unit. The same disciplinary procedure applies to all employees. The members of the proposed unit participate together in the school-wide events and sometimes share each other’s responsibilities. The evidence demonstrates that it is reasonable for the employees to negotiate jointly. In addition, the District’s evidence is insufficient to prove that the formation of this bargaining unit will have a negative effect on the efficiency of school operations. Similarly, the evidence is insufficient to prove that the employees within the proposed bargaining unit will likely experience a division of loyalties between the public employer and the exclusive representative. Accordingly, the Petitioner satisfied its burden of demonstrating the existence of the requisite community of interest.

The District argues that the Paraprofessionals must be excluded from the proposed bargaining unit because: (1) the Paraprofessionals are supervised by the Special Education Teacher who is a member of the existing bargaining unit represented by Bethlehem Education Association/NEA-NH; (2) NEA-NH is the employee organization that currently seeks to represent the Paraprofessionals; and (3) under *Appeal of Manchester Board of School Committee*, 129 N.H. 151, 153 (1987), the same exclusive representative cannot represent the supervisors and the employees they supervise.

RSA 273-A:8, II provides that the “[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.” In *Appeal of Manchester Board of School Committee*, the Supreme Court held that “supervisory personnel may not retain the same exclusive representative as the rank-and-file employees they supervise.” 129 N.H. at 153. In determining whether an employee exercises supervisory authority, important factors to consider include “the employee’s authority to evaluate other employees, the employee’s supervisory role, and the employee’s disciplinary authority.” *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999) (citing *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 610 (1993)). See also *Jaffrey Rindge Support Staff Association, NEA-New Hampshire v. Jaffrey Rindge Cooperative School District*, PELRB Decision No. 2004-183. “Supervisory employees are separated from the employees they supervise ‘to avoid conflicts between the two groups because of the differing duties and relationships which characterize each group.’” *Appeal of Town of Stratham*, 144 N.H. at 432 (citing *Appeal of University System of N.H.*, 131 N.H. 368, 375 (1988)). “[S]ome employees performing supervisory functions in accordance with professional norms will not be vested with the ‘supervisory authority involving the significant exercise of discretion’ described by RSA 273-A:8, II.” *Appeal of East Derry Fire Precinct*, 137 N.H. at 611. See also *Tilton Police Union, NEPBA Local 29 and Town of Tilton*, PELRB Decision No. 2007-100. It is therefore proper to examine the degree of significance of the exercise of discretion as well as the propensity to create conflict within the bargaining unit because of the differing duties and relationships. See *Londonderry Executive Employee Association v. Town of Londonderry*, PELRB Decision No. 2001-118.

In the present case, the evidence is insufficient to prove that the Special Education Teacher exercises supervisory authority involving the significant exercise of discretion with

respect to the Paraprofessionals. The Special Education Teacher does not have authority to hire, fire, or discipline the Paraprofessionals. Although the Special Education Teacher distributes the evaluation forms to the Paraprofessionals and, after they are completed, reviews them and submits them to the Principal, these responsibilities do not involve significant exercise of discretion. The evidence is insufficient to show that these evaluations are used in promotion, increase in salary, hiring, termination, or disciplinary decisions. The Special Education Teacher does not return the forms approved and signed by the Principal to the Paraprofessionals neither does she communicate the results of the evaluations to the employees. The evidence is insufficient to show that the Special Education Teacher provides significant input into the administration's decisions to promote, hire, fire, or discipline Paraprofessionals. The evidence shows that only the School Board has authority to hire, fire, promote, or discipline the employees of the Bethlehem Elementary School. Therefore, the Special Education Teacher does not exercise supervisory authority involving the significant exercise of discretion with respect to the Paraprofessionals.

Since the Paraprofessionals are not "supervised" within the meaning of RSA 273-A:8, II by the Special Education Teacher, the District's allegation that the Special Education Teacher is represented by the same employee organization as the one seeking to represent the Paraprofessional is without merit. Accordingly, the Paraprofessionals are included in the bargaining unit.

The Respondent also argues that the position of Food Service Manager (also referred to as Cafeteria Manager) is a supervisory position with respect to the position of Cafeteria Assistant and, therefore, should not be included in the same unit as Cafeteria Assistant. The District's evidence is insufficient to prove that the Food Service Manager has authority to discipline, hire, fire, or promote the Cafeteria Assistant. The evidence demonstrates that the Food Service

Manager has no input into hiring or firing decisions. In addition, the Food Service Manager has not evaluated the Cafeteria Assistant for at least 3 years. Therefore, the evidence is insufficient to show that the Food Service Manager exercises supervisory authority involving the significant exercise of discretion with respect to the Cafeteria Assistant. Accordingly, the positions of Food Service Manager/Cafeteria Manager and Cafeteria Assistant are included in the bargaining unit.

The Respondent further argues that the position of Director of Maintenance is a supervisory position and, therefore, should not be included in the same unit as the position of Custodian. The undersigned hearing officer finds that the Director of Maintenance does not have authority to hire, fire, or discipline the Custodian. The evidence demonstrates that the Director of Maintenance provides no input into hiring or firing decisions. There is insufficient evidence to establish that the evaluations signed by the Director of Maintenance and submitted to the Principal result in promotion, increase or decrease in salary, or in an imposition of a discipline. Therefore, the evidence is insufficient to prove that the Director of Maintenance exercises supervisory authority involving the significant exercise of discretion with respect to the Custodian. Accordingly, the positions of Director of Maintenance and Custodian are included in the bargaining unit.

The District also seeks to exclude the positions of Administrative Assistant and Secretary from the proposed bargaining unit claiming that these positions are confidential. RSA 273-A:1, IX (c) excludes confidential employees from the definition of a “public employee.” Confidential employees are “[p]ersons whose duties imply a confidential relationship to the public employer.” RSA 273-A:1, IX (c). The PELRB has previously defined “confidential employees” as those employees who have “access to confidential information *with respect to labor relations, negotiations, significant personnel decisions and the like.*” *State of New Hampshire, Dept. of Rev. Administration v. State Employees’ Ass’n*, PELRB Decision No. 78001 (emphasis in

original). See also *Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket*, PELRB Decision No. 2008-127.


In the present case, the District's evidence is insufficient to show that the positions of Administrative Assistant and Secretary are confidential positions. The District failed to offer any evidence demonstrating that the duties and responsibilities of the Administrative Assistant and the Secretary involve handling confidential personnel matters or matters related to the labor relations. On the contrary, the evidence demonstrates that the final decisions on personnel matters and on the collective bargaining and grievances under the existing CBA are made at the School Board level, and not by the Principal or the Superintendent, which indicates that the School Board's secretarial staff, and not the secretarial staff of the Elementary School, handles the documentation and correspondence related to the personnel and labor relations matters. Therefore, the positions of Administrative Assistant and Secretary are included in the bargaining unit.

Accordingly, this matter shall proceed to election, and the approved bargaining unit shall consist of the following positions:

Paraprofessional, Food Service Manager/Cafeteria Manager, Cafeteria Assistant, Director of Maintenance, Custodian, Administrative Assistant, Secretary, and Library Assistant.

So ordered.

March 19, 2010


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

Distribution:

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