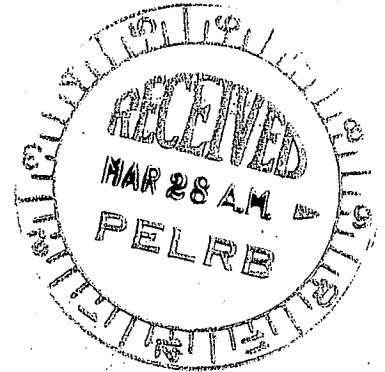


William R. Carr 3/26/12
 Clerk/Dep. by Clerk Date

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
 No. 2011-281



APPEAL OF HOLLIS EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE
 (New Hampshire Public Employee Labor Relations Board)

Argued: January 18, 2012
 Opinion Issued: March 9, 2012

Jackson Lewis LLP, of Portsmouth (Thomas M. Closson on the brief and orally), for the petitioner.

James F. Allmendinger, of Concord, staff attorney, NEA-New Hampshire, by brief and orally, for the respondent.

HICKS, J. The respondent, the Hollis Education Association, NEA-New Hampshire (association), appeals a decision of the public employee labor relations board (PELRB) sustaining an unfair labor practice complaint filed by the petitioner, the Hollis School Board (board), and ruling that the speech-language pathologists and occupational therapists employed by the Hollis School District (district) are not members of the bargaining unit represented by the association. We affirm.

The following facts were found by the PELRB or are supported in the record. In 1976, the association and the district entered into a collective bargaining agreement (CBA) that contained a recognition clause, defining the scope of the bargaining unit as "[c]ertified full-time teachers, librarians and

guidance counsellors who actively teach at least 50% of their time in the Hollis School District and are employed by said district, in accordance with Article I, Agreement dated October 1, 1975.” That same year, the PELRB certified the association as the bargaining unit’s exclusive representative. See RSA 273-A:8, I (Supp. 1975) (amended 1983, 2008, 2011).

Pamela Banks and Robin Fitton were hired by the district as speech-language pathologists in 1994 and 2002, respectively. Banks and Fitton are speech-language pathologists licensed through the New Hampshire Office of Licensed Allied Health Professionals (NH Allied Health Professionals) and are certified by the American Speech-Language-Hearing Association. Fitton testified that, when she was hired, she was told that her salary had to conform to the salary schedule in the CBA.

William Olszewski was hired by the district in 2003 as an occupational therapist. He is an occupational therapist licensed through NH Allied Health Professionals and certified by the National Board for Certification in Occupational Therapy. When Olszewski was hired, the superintendent told him that his position was covered by the CBA. He was also told that he could not negotiate a higher salary because the district had to comply with the salary schedule in the CBA.

Banks, Fitton and Olszewski each signed a “New Hampshire Teacher Contract” every year of their employment through 2009. These contracts were the same as those received by members of the bargaining unit. They were also required to provide written receipts acknowledging that they received copies of every new CBA. In addition, for the years 2005, 2007 and 2009, all three individuals were included in a salary schedule given to the association by the board during collective bargaining negotiations; the schedule listed employees presumed to be in the bargaining unit.

In April 2010, the superintendent notified Fitton that, “due [to] a reduction in force caused by decreasing enrollments and accompanying budgetary reductions,” her employment with the district would be terminated effective June 30, 2010. Shortly thereafter, the association filed a grievance with the superintendent claiming that Fitton’s termination violated the CBA. The superintendent denied the grievance, ruling that Fitton’s termination did not violate the CBA because speech-language pathologists are not members of the CBA as stipulated in the recognition clause.

In July, Banks and Olszewski received employment agreement letters for the 2010-2011 school year that differed from the annual “New Hampshire Teacher Contract.” Subsequently, the association, believing that Banks and Olszewski were members of the collective bargaining unit, filed a grievance claiming that speech-language pathologists and occupational therapists are

entitled to the same individual contracts as other members of the bargaining unit. It then made a demand for arbitration pursuant to the terms of the CBA.

In August, the board filed an unfair labor practice complaint with the PELRB, claiming that the association could not file a grievance or request arbitration on behalf of speech-language pathologists because they are not members of the applicable bargaining unit. The board alleged that the association's demand for arbitration violated RSA 273-A:5, II(f) and (g) (2010), and sought to have the PELRB order the association to cease and desist its demand. On October 5, the PELRB held a hearing on the board's complaint. At the hearing, the parties agreed that in connection with the board's complaint, the PELRB could address the association's grievance and demand for arbitration on behalf of the speech-language pathologists and the occupational therapists.

Following the hearing, the PELRB ruled that speech-language pathologists and occupational therapists are not members of the 1976 bargaining unit certification. While it found that, "for a number of years prior to 2010," the association and the district treated speech-language pathologists and occupational therapists "just like bargaining unit positions, and in particular just like the certified teacher position," it concluded that "[t]he disputed positions are not part of the PELRB bargaining unit certification" because they "are not listed in the [1976] certified bargaining unit" and are not included within the term "certified teacher." As a result, it found that it could not "recognize any right of the Association to proceed to arbitration" on behalf of those positions. The association's motion for rehearing was denied, and this appeal followed.

Our standard of review in this case is governed by RSA 541:13 (2007). Appeal of Londonderry School Dist., 142 N.H. 677, 680 (1998); RSA 273-A:14 (2010). To succeed on appeal, the association must show that the PELRB's decision is unlawful, or clearly unjust or unreasonable. Appeal of Town of Deerfield, 162 N.H. 601, 602 (2011); RSA 541:13. The PELRB's findings of fact are presumptively lawful and reasonable and will not be disturbed if they are supported by the record. Appeal of Town of Deerfield, 162 N.H. at 602; see RSA 541:13.

The PELRB has the exclusive authority to certify a bargaining unit. Appeal of Somersworth School Dist., 142 N.H. 837, 840 (1998); RSA 273-A:8, I. However, it must do so according to the dictates of the statute granting that authority. Appeal of Somersworth School Dist., 142 N.H. at 840. RSA 273-A:8, I, provides that "[t]he board . . . shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10." "The composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original

unit is certified by the PELRB and by any subsequent modifications approved by the PELRB.” Appeal of Londonderry School Dist., 142 N.H. at 680.

Here, although the CBA in effect in 2010 contains a slightly modified version of the recognition clause, no changes to the composition of the bargaining unit have been approved by the PELRB since 1976. See RSA 273-A:8, I, :10 (Supp. 2011). Thus, we will examine the relevant language of the 1976 recognition clause to determine whether the bargaining unit certified by the PELRB includes speech-language pathologists and occupational therapists. See Appeal of Somersworth School Dist., 142 N.H. at 840.

Interpretation of the recognition clause is a question of law, which we review de novo. See Appeal of Londonderry School Dist., 142 N.H. at 680. The 1976 recognition clause defines members of the bargaining unit as “[c]ertified full-time teachers, librarians and guidance counsellors who actively teach at least 50% of their time in the Hollis School District and are employed by said district.” The recognition clause does not specifically refer to speech-language pathologists or occupational therapists. Nonetheless, the association argues that the term “certified teacher” is “broad enough to include speech-pathologists and occupational therapists.” It maintains that “[s]ince both job titles teach and are certified, they should fall within . . . the recognition clause.” We disagree.

Since there is no dispute that the employees in this case were “full-time,” we will look to the plain meaning of the term “certified teachers.” The common meaning of “certified” is “endorsed authoritatively : guaranteed or attested as to quality, qualifications, fitness, or validity.” Webster’s Third New International Dictionary 367 (unabridged ed. 2002). “Teacher” has the following relevant meaning: “one that teaches or instructs . . . ; esp : one whose occupation is to instruct.” Id. at 2346. Thus, a “certified teacher” refers to an employee whose occupation is to teach and who has the necessary qualifications to do so, i.e., an individual with a certification to teach. By its plain language, the term “certified full-time teachers” does not include speech-language pathologists or occupational therapists.

There is no dispute that Banks, Fitton and Olszewski are both licensed and certified in their respective fields, see RSA 326-C:5 (2011) (statute governing licensing of occupational therapists); RSA 326-F:3 (2011) (statute governing licensing of speech-language pathologists), and that speech-language pathologists may be certified by the New Hampshire Department of Education, see RSA 189:14-e (2008) (statute governing certification of speech-language specialists who “provide speech-language pathology services for schools”); N.H. Admin. Rules, Ed 507.23 (Board of Education certification standards for speech-language specialists). Furthermore, there is no dispute that these individuals were treated, and required to perform many of the same duties, as

“certified full-time teachers.” However, these facts do not render them “certified full-time teachers” under the 1976 recognition clause. See N.H. Admin. Rules, Ed 507.11 (Board of Education certification standards for elementary education teachers).

The association asserts that “[t]he PELRB erred in tying certification and bargaining unit standards to 1976 requirements” because “the teaching profession – and State Board of Education certifications – have changed markedly in the last 45 years.” While the teaching profession may have changed since 1976, the PELRB must follow the necessary statutory procedures for determining the composition of a bargaining unit. As laid out above, pursuant to RSA 273-A:8, I, “[t]he board . . . shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10.” (Emphasis added.)

The association further contends that the PELRB should have considered parol evidence, specifically, “the long history of the inclusion of [speech-language pathologist and occupational therapist] employees in the bargaining unit.” A review of the PELRB’s decision reveals that it, in fact, considered this history but nonetheless was not persuaded that the term “certified full-time teachers” included these employees. As discussed above, we find no error in this decision.

Moreover, “[s]imilarity in compensation between employees holding different positions is not dispositive of an employee’s inclusion in a bargaining unit. Otherwise, an employer could never provide similar compensation for union and non-union positions without fear of enlarging the bargaining unit.” Appeal of Londonderry School Dist., 142 N.H. at 682 (citations omitted). An employer cannot define the scope of the bargaining unit by compensating one position at the same rate as a position within a bargaining unit. Id. Likewise, neither an employer nor a union can “avoid the need to satisfy the statutory requisites for adding [a] position to the bargaining unit,” id., by simply treating certain positions as though they were included within the bargaining unit. See RSA 273-A:8, I.

Finally, we reject the association’s suggestion that the PELRB should have acted “equitably in reaching a decision” in this case. As we stated in Appeal of the Somersworth School District, “[t]he PELRB’s broad jurisdiction . . . applies only to those matters specifically encompassed within” RSA chapter 273-A and “the statute does not give it the ability to grant all equitable remedies.” Appeal of Somersworth School Dist., 142 N.H. at 841. While the PELRB might have included these positions in the bargaining unit had a petition to modify been filed, the legislature did not give it the authority to modify the bargaining unit in the absence of such a request. See RSA 273-A:8, I; cf. Appeal of Somersworth School Dist., 142 N.H. at 841 (finding “that it was

error for the PELRB to use an equitable remedy to include [an individual] in a collective bargaining agreement which by its terms did not apply to him”).

In light of our ruling, we need not address the association’s remaining arguments as they are premised upon inclusion of speech-language pathologists and occupational therapists in the bargaining unit.

Affirmed.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hollis School Board

v.

Hollis Education Association/NEA-NH

Case No. E-0037-2

Decision No. 2011-045

Appearances:

Thomas M. Closson, Esq., Jackson Lewis LLP, Portsmouth, New Hampshire for
the Complainant

James F. Allmendinger, Esq., NEA-NH, Concord, New Hampshire, for the
Respondent

Background:

The Hollis School Board filed an unfair labor practice complaint against the Hollis Education Association/NEA-NH on August 6, 2010, complaining that the Association has improperly demanded arbitration pursuant to the grievance procedure contained in the parties' collective bargaining agreement for a speech language pathologist and an occupational therapist. According to the School Board neither position is in the bargaining unit and therefore the Association cannot bring the grievances to arbitration on that basis. The School Board claims that the Association's conduct violates RSA 273-A:5, II (f) and (g) and requests that the PELRB order the Association to cease and desist its demands for arbitration.

The Association denies the charges and argues that both positions are in the bargaining unit and therefore the demands for arbitration were proper. The Association requests that the underlying grievances continue to arbitration as it has demanded.

On October 5, 2010 this Board held a hearing at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs and the Board's decision is as follows.

Findings of Fact

1. The Hollis Education Association/NEA-NH is the certified exclusive representative of employees holding positions in the following bargaining unit pursuant to the PELRB December 7, 1976 certification:

Certified full-time teachers, librarians and guidance counselors who actively teach at least 50% of their time in the Hollis School District and are employed by said district, in accordance with Article I, Agreement dated October 1, 1975.

2. The Hollis School Board is a public employer within the meaning of RSA 273-A:1, IX.

3. There is no evidence in the record to show that Speech Language Pathologists (SPs) and Occupational Therapists (OTs) were employed in the Hollis School District (District) at the time the bargaining unit was certified in 1976.

4. The State Department of Education issues certifications for teachers and for SPs per RSA 21-N:9 and RSA 189:14-e. SPs holding licenses pursuant to RSA 326-F and 328-F automatically meet RSA 189:14-e certification requirements.

5. Robin Fitton is an SP who was employed in the District from 2002 through 2010. She has a speech language pathologist license from the New Hampshire Office of Licensed Allied

Health Professionals and from the Massachusetts Division of Professional Licensure. She is a member of the American Speech-Language Hearing Association.

6. Ms. Fitton was presented with and signed a "New Hampshire Teacher Contract Annual" for each year of her employment with the District. In July, 2002 she provided a written receipt to then Superintendent of Schools Kenneth DeBenedictis acknowledging she had received a copy of the July 1, 2002 to June 30, 2004 collective bargaining agreement. Superintendent DeBenedictis was eventually succeeded by Susan E. Hodgdon as superintendent in July of 2008.

7. Pamela Banks is also a SP and has a license from the New Hampshire Office of Licensed Allied Health Professionals. She is also a member of the American Speech-Language Hearing Association. She signed a "New Hampshire Teacher Contract Annual" every year from 1994 through 2009, and she has also provided a written receipt to Superintendent DeBenedictis acknowledging she had received a copy of the collective bargaining agreement.

8. For the 2010-2011 school year the District did not provide Ms. Banks with the standard "New Hampshire Teacher Contract Annual." Instead, in July, 2010 Superintendent Hodgdon sent Ms. Banks an employment agreement letter which reflects the District's current view that Ms. Banks is not a bargaining unit employee and is not entitled to an employment agreement based upon the provisions of the collective bargaining agreement.

9. William Olszewski is an Occupational Therapist (OT) employed in the District and like Ms. Banks and Ms. Fitton had always received a standard "New Hampshire Teacher Contract Annual" prior to 2010. In 2010 he did not receive that standard contract but was instead provided with essentially the same individual employment agreement that was offered to Ms. Banks based upon the District's conclusion that he was not a bargaining unit employee.

10. When he was hired Mr. Olszewski received confirmation from Superintendent DeBenedictis and at least one other District representative that his employment was covered by the collective bargaining agreement and he needed to sign a standard “New Hampshire Teacher Contract Annual.” Mr. Olszewski believes his compensation may have been greater had he not been restricted by the negotiated salary schedules reflected in the collective bargaining agreement.

11. Until 2010 Ms. Fitton, Ms. Banks and Mr. Olszewski were treated as though they were members of the bargaining unit, either because District officials believed they in fact held positions covered by the bargaining unit certification or for administrative convenience. In addition to receiving the standard teacher contract prior to 2010 they were also listed on salary schedules (along with undisputed bargaining unit employees) referenced during the course of negotiations in 2005, 2007, and 2009.

12. The inclusion of the SP and OT positions in the bargaining unit was the subject of an Association proposal during collective bargaining in the April, 2010 time period.

13. In April, 2010 Superintendent Hodgdon notified Ms. Fitton that due to a reduction in force caused by decreasing enrollments and budgetary reductions her employment would end on June 30, 2010.

Decision and Order

Decision Summary:

Hollis School District speech language pathologists and occupational therapists are not covered by the 1976 PELRB bargaining unit certification and accordingly the School Board’s complaint is sustained on that basis.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

This case requires the Board to resolve whether SPs and OTs hold positions covered by the PERLB bargaining unit certification issued in 1976. That certification describes the bargaining unit as “certified full-time teachers, librarians and guidance counselors who actively teach at least 50% of their time in the Hollis School District...” Although they are licensed or certified SP’s and OT’s, and not certified teachers, SP’s and OT’s received standard teacher contracts until 2010, were referenced in wage schedule information referenced during collective bargaining, were required to acknowledge receipt of the collective bargaining agreement, and at least one individual (Mr. Olszewski) was told by District representatives that he could not negotiate his compensation arrangement because the District was obligated to comply with the collective bargaining agreement. The Association and the School Board and the District dealt with SPs and OTs in this way for a number of years.

This history shows that for a number of years prior to 2010 SP and OT positions were treated just like bargaining unit positions, and in particular just like the certified teacher position. However, this history does not settle the dispute in this case. The District may provide non-bargaining unit employees with the same terms and conditions of employment as bargaining unit employees without “fear of enlarging the bargaining unit.” *See Appeal of Londonderry School District*, 142 N.H. 677, 682 (1998). Collective bargaining agreements “may reflect the rights of employees not included in bargaining units.” *Id.* (*citations omitted*). Additionally, only the PELRB can modify an existing certified bargaining unit, a process that requires the filing of a

proper modification petition. The PELRB cannot recognize or effectuate a modification of a bargaining unit in the absence of proper modification proceedings on the basis of public employer conduct since the PELRB lacks jurisdiction to fashion an appropriate equitable remedy under equitable estoppel or some other potentially applicable equitable doctrine. *See Appeal of Somersworth*, 142 N.H. 837, 841 (1998).

The “supremacy” of PELRB bargaining unit certifications was illustrated in a recent case in which the Board was called upon to resolve a conflict between the PELRB’s bargaining unit certification on record and a collective bargaining recognition clause by finding that the certification defined the bargaining unit:

Under RSA 273-A:8, I, “[t]he board or its designee shall determine the appropriate bargaining unit...when petitioned.” “The composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB.” *Appeal of Londonderry School District*, 142 N.H. 677, 680 (1998)(citations omitted). *Appeal of Londonderry* involved a “grandfathered” unit in existence prior to the effective date of RSA 273-A.

The process for requesting the board’s review and approval of a change to a previously certified bargaining unit involves the filing of a modification petition in accordance with Pub 302.05. AFSCME states in its brief that it “is mere oversight that the Board certification was never amended to reflect the same (the recognition clauses).” Whatever the reason, the Town and/or AFSCME have never filed a modification petition seeking a change to the 1985 amended certification, and accordingly the description of the Milford Police Employees bargaining unit contained in the recognition clause since 1988 has never been reviewed or approved by the board.

Town of Milford v. AFSCME Local 3657, Milford Police Employees, PELRB Decision No. 2007-183.

Because the positions of SP and OT are not listed in the certified bargaining unit, and given the PELRB’s lack of authority to modify the bargaining unit in these proceedings based on the prior course of conduct, the question is limited to whether the individual SP’s and OT’s employed in the Hollis School District are in fact “certified teachers” or whether the term

“certified teacher” is somehow inclusive of SPs and OTs. The Board understands “certified teacher” to mean an individual holding a teacher certification issued by the State Board of Education, particularly in the 1976 time period. There is insufficient evidence to establish that a different meaning was intended at the time the bargaining unit certification issued in 1976, and the Board has determined that the involved employees in this case do not have teacher certifications. The Association offers a strong argument that these employees must be certified teachers given their employment history in the District. However, in the final analysis we find that the involved employees are licensed SPs and OTs, or perhaps certified SPs and OTs, but not certified teachers. There is a difference which we are compelled to recognize. If the PELRB certification employed broader and more inclusive language in the description of the bargaining unit we might reach a different conclusion; however, we are constrained in our analysis by the PELRB certification language actually employed.

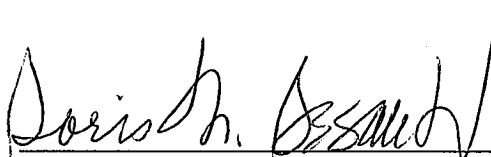
In deciding this case we are sympathetic to the plight of the affected employees but note that the applicable law does not provide us with much leeway to reach a decision that reflects the history of the bargaining unit and the treatment of the SP and OT positions. It is apparent that the School Board and new Superintendent’s actions in 2010 represent a reversal of established, understood, and accepted practice, and that they have taken refuge in the legal sanctuary provided by the *Somersworth* and *Londonderry* decisions, primarily, if not entirely, because of budgetary concerns. While we must recognize the right of the Superintendent and the School Board to do so, we are not required to approve of their conduct and decision. Hopefully this case will serve as something of a clarion call to parties in similar situations of the importance of filing proper modification petitions in a timely manner. The maintenance of accurate and up to date PELRB bargaining unit certifications helps establish clarity as to the scope of bargaining

units that is beneficial to employee organizations, public employers, public employees, and the Board.

In accordance with the foregoing the School Board's unfair labor practice is sustained. The disputed positions are not part of the PELRB bargaining unit certification and therefore the PELRB cannot recognize any right of the Association to proceed to arbitration on that basis.

So ordered.

February 9th, 2011.



Doris M. Desautel, Alternate Chair

By unanimous vote of Alternate Chair Doris Desautel, Board Member Kevin E. Cash and Board Member Carol M. Granfield.

Distribution:

Thomas M. Closson, Esq.
James F. Allmendinger, Esq.



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hollis School Board

v.

Hollis Education Association/NEA-NH

Case No. E-0037-2


Decision No. 2011-079

Order on Motion for Rehearing

The Hollis Education Association/NEA-NH filed a Motion for Rehearing of the Board's prior decision (2011-045) pursuant to Pub 205.02. Upon review the Association's motion is denied.

So ordered.

March 22, 2011.



Doris Desautel, Alternate Chair

By unanimous vote of Alternate Chair Doris Desautel, Board Member Kevin E. Cash and Board Member Carol Granfield.

Distribution:

Thomas M. Closson, Esq.
James F. Allmendinger, Esq.