



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Contoocook Valley School District

and

Contoocook Valley Education Association, NEA-NH

Case No. E-0048-5
Decision No. 2013-171

Appearances:

Kathleen C. Peahl, Esq., Wadleigh, Starr & Peters, PLLC for the Contoocook Valley School District

James F. Allmendinger, Esq., NEA-NH, Concord, New Hampshire for the Contoocook Valley Education Association, NEA, NH

Background:

On January 16, 2013 the Contoocook Valley School District (District) filed a Petition for Declaratory Ruling and/or to Modify the Bargaining Unit asking the PELRB to determine whether the PELRB Recognition of an Exclusive Representative, Case No. T-0275, December 1, 1976, covers paraprofessional employees or, in the alternative, to remove paraprofessionals from the unit.¹ The PELRB notified the District on January 22, 2013 that its filing was being processed as a Petition for Declaratory Ruling and that should the District "wish to request a modification of the bargaining unit a Petition for Modification utilizing the PELRB form must be submitted under Pub 302." See PELRB Notice of Filing Cover Letter. During the March 13, 2013 pre-hearing conference, the District informed the PELRB that it was not seeking modification of the unit at that time.

¹ Designations "paraprofessionals," "instructional assistants," "assistants," and "paraprofessional employees" denote the same positions and are used interchangeably in the record and in this decision.

The District requests that the PELRB declare that the subject bargaining unit does not include paraprofessional employees. The District argues, among other things, that neither the 1976 Petition for Certification of an Existing Employee Representative nor the resulting PELRB Recognition of an Exclusive Representative includes paraprofessional employees.

The Contoocook Valley Education Association, NEA-NH (Association) counters that paraprofessional employees are included in the bargaining unit because, among other things, the subject unit included paraprofessional employees at the time the unit was certified by the PELRB and at all times thereafter. The Association requests that the PELRB dismiss the petition for the following reasons: (1) the petition is barred by laches; (2) the issues raised in the petition have been addressed and resolved in prior PELRB decisions; and (3) the District's statement of facts is incomplete. The Association also argues that the District's petition "should be treated as a petition for modification."

On April 9, 2013 the parties appeared for a hearing at the PELRB offices in Concord and agreed to submit this case on stipulated facts, oral arguments, offers of proof, and briefs.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:1.
2. The Association has represented certain employees of the District since at least 1973.

The District has recognized the Association as a representative of the bargaining unit and bargained with the Association prior to the issuance of the Recognition of Exclusive Representative by the PELRB. See Stipulated Facts at B.

3. The District and the Association were parties to the 1973-76 collective bargaining agreement (CBA) which provided as follows in its Recognition Clause:

1-1 For purposes of collective negotiations concerning salaries and direct economic benefits, the Board recognizes the Contoocook Valley Teachers Association as the exclusive representative for full time professional employees of the Contoocook Valley School District Supervisory Union #47 including individuals employed by the Contoocook Valley School Board of Supervisory Union #47 the qualifications for whose positions are such as to require him to

hold an appropriate credential issued by the State Board of Education under its regulations governing the certification of professional school personnel excluding Superintendents, Assistant Superintendents, principals, curriculum coordinators, directors, teacher consultants, business administrators, or other persons employed by the State Board of Education and all other employees of the Board...

1-2 For the duration of this Agreement, the unit shall include those persons now and hereafter who, for a substantial portion of their time, perform the duties or functions of the employees included in the unit defined in Article 1, Section 1-1 of this Agreement.

The 1973-76 CBA expired on June 30, 1976. See Joint Exhibit B.

4. On February 3, 1976 the District and the Association entered into a CBA with effective dates of July 1, 1976 through June 30, 1979. See Association Exhibit 9.

5. Article 1 of the 1976-79 CBA, titled Recognition, provided as follows:

For purposes of collective negotiations concerning salaries and direct economic benefits, the Board recognizes the Contoocook Valley Teachers' Association as the exclusive representative for full-time professional employees of the Contoocook Valley School District Supervisory Union #47 including individuals employed by the Contoocook Valley School Board of Supervisory Union #47 the qualification for whose position are such as to require him or her to hold an appropriate credentials issued by the State Board of education under its regulation governing the certification of professional school personnel *including instructional assistants* but excluding Superintendents, Assistant Superintendents, Principals, Assistant Principals, Teaching Principals, Department Heads, Business Administrators, and other persons employed by the State Board of Education and all other employees of the Board....

Appendix B of the 1976-79 CBA contained the Instructional Assistant Salary Schedule. See Association Exhibit 9 (emphasis added).

6. On July 29, 1976 the Association filed with the PELRB a Request for Certification of an Existing Employee Representative. This request contained the following description of the bargaining unit: All licensed professional personnel excluding Superintendents, Assistant Superintendents, principals, curriculum coordinators, directors, teacher consultants, business administrators, or other persons employed by the State Board of Education and all other employees of the Board. See Joint Exhibit E.

7. The Association indicated in its 1976 Request for Certification that it had represented the

bargaining unit since approximately 1970 and was the employee representative in existence on December 21, 1975.² The Association filed the 1973-76 CBA “as evidence of employee organization’s position.” See Joint Exhibit E.

8. On December 7, 1976, based on the Association’s filings, the PELRB issued a Recognition of Exclusive Representative certifying the Association as the exclusive bargaining representative for a bargaining unit consisting of “[a]ll licensed professional personnel excluding superintendents, assistant superintendents, principals, curriculum coordinators, directors, teacher consultants, business administrators, or other persons employed by the State Board of Education and all other employees of the Board *in accordance with the Recognition Clause Article 1.*” The PELRB recognized the grandfathered unit “in accordance with New Hampshire Supreme Court Decision No. 7540, November 9, 1976, SEA v. PELRB” (*State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board*, 116 N.H. 653 (1976)). See Joint Exhibit A (emphasis added).

9. All collective bargaining agreements subsequent to the 1976-79 agreement (eleven agreements) also included “instructional assistants,” “assistants,” or “paraprofessionals” in the Recognition Clause. See Stipulated Facts at D and Association Exhibit 9. The parties were without a contract from 2008 to 2011.

10. At the time the PELRB certified the bargaining unit in 1976, instructional assistants/paraprofessionals were not licensed or certified by the Department of Education. The Department of Education now certifies paraprofessionals/instructional assistants. See Stipulated Facts at H.

11. The parties have treated paraprofessionals as though they were included in the certified bargaining unit since at least 1976. Stipulated Facts at E.

12. Based on the Association’s offer of proof, paraprofessionals were included in the subject bargaining unit since at least 1973.

² The effective date of the Public Employee Labor Relations Act, RSA 273-A.

13. Vernon Young was hired by the District as a mathematics teacher in spring of 1973. He worked as the District's mathematics teacher for eight years and was on the Association's negotiating team during negotiations on 1976-79 and 1979-84 agreements. According to Mr. Young, at the time he was hired by the District in 1973, paraprofessionals were included in the subject bargaining unit.

14. Negotiations on the 1976-79 CBA started in the fall of 1975. As a negotiating team member, Mr. Young was responsible for calculating salaries. According to Mr. Young, during contract negotiations in 1975-1976, there was no discussion regarding removal of paraprofessionals from the unit.

15. The Association has treated paraprofessionals as members of the subject bargaining unit since the unit's inception. The Association prosecuted grievances on behalf of paraprofessional unit members and represented their interests, along with interests of other members of the unit, during contract negotiations. At least one paraprofessional was a member of the Association's negotiating team and an Association's Co-President.

16. During 1998-2000 contract negotiations, the District proposed to remove some paraprofessionals from the bargaining unit. The Association did not agree to the removal of paraprofessionals. The District explored possibilities of removal of paraprofessionals from the unit again during 2007 contract negotiations. The Association again rejected the proposal to remove paraprofessionals.

17. One of the Association's grievances filed on behalf of paraprofessionals in 2008 concerned a duty free lunch for paraprofessionals. This grievance proceeded to arbitration in accordance with the parties' CBA. In his July 24, 2009 award, the arbitrator found, among other things, the existence of a 25-year past practice of providing duty free lunch to paraprofessionals and ordered the District to compensate affected paraprofessionals. See Association Exhibit 5. In discussions regarding the duty free lunch dispute, School Board Chair Quentin Estey stated that

if the Association did not agree to settle the matter without back pay for paraprofessionals, the School Board would explore a possibility of removal of paraprofessionals from the unit.

18. In June of 2010 the Association filed an unfair labor practice with the PELRB alleging that the District failed to compensate paraprofessionals fully in accordance with the July 24, 2009 arbitrator's award. In its answer to the complaint, the District admitted that paraprofessionals were in the bargaining unit represented by the Association. Association Exhibits 7 & 8.

19. On June 13, 2011 the parties signed the most recent CBA. This agreement is effective from July 1, 2011 through June 30, 2015 and contains the following Recognition Clause:

For the purposes of collective negotiations as required under RSA 273-A, the Board recognizes the Contoocook Valley Association as the exclusive representative for full and part-time professional employees of the Contoocook Valley School District School Administrative Unit #1 including individuals employed by the Contoocook Valley School Board of School Administrative Unit #1 the qualifications for whose positions are such as to require him or her to hold an appropriate credential issued by the State Board of Education under its regulation governing the certification of professional school personnel *including paraprofessionals* but excluding Superintendents, Assistant Superintendents, Principals, Assistant Principals, Teaching Principals, Business Administrators, and other persons employed by the State Board of Education and all other employees of the Board.

Full-time means any professional staff working 35 hours or more per week for the school year...

Full-time means any paraprofessional working 35 hours or more per week for the school year...

See Stipulated Facts at F and Joint Exhibit C (emphasis added).

20. Many of the 2011-15 CBA provisions apply to all employees in the unit, professional employees and paraprofessionals, including provisions addressing sick and other leave, tuition reimbursement, professional development, health, dental and other insurance, grievance procedure, payroll deductions, and rights of bargaining unit members to representation. The CBA also contains provisions separated out by professional and

paraprofessional employees, including provisions covering seniority, work day and work year, performance evaluations, transfers, non-renewals, reduction in force, and pay rate schedules. See Joint Exhibit C.

21. In 2012 the Association filed a nonrenewal-related grievance on behalf of a paraprofessional employee. According to Human Resources Director Timothy Markley, this grievance brought up CBA issues³ for the District and prompted him to conduct research, as a result of which he concluded that the language in the PELRB certification unit description is different from the language in the CBA Recognition Clause and does not include “instructional assistants.” He related his findings to the District Superintendent.

22. The School Board proposed again to remove paraprofessionals from the unit and to recognize a separate bargaining unit composed of paraprofessionals. See Stipulated Facts at G. The Association rejected the District’s offer to remove paraprofessionals and place them into a separate bargaining unit, after which the School Board agreed in a non-public session of the Board meeting to proceed with a declaratory ruling petition.

Decision and Order

Decision Summary:

The bargaining unit certified by the PELRB on December 7, 1976 and represented by the Association includes paraprofessional employees.

Jurisdiction:

The PELRB issues declaratory rulings pursuant N.H. Admin. Rule Pub 206.01, which provides as follows:

(a) Any public employer, any public employee or any employee organization may petition the board under RSA 541-A for a ruling regarding the specific applicability of any statute within the jurisdiction of the board to enforce, or any rule or *order of the board*, by filing with the board a petition for declaratory ruling setting out:

(1) The specific statute, rule or order whose applicability is in question; and

³According to Mr. Markley, he finds it difficult to apply reduction-in-force, transfer, and other provisions to paraprofessionals because paraprofessionals do not enjoy the same statutory protections as teachers.

- (2) A clear and concise statement of the facts giving rise to the petition.
- (b) The board shall determine within 30 days of filing whether it shall dismiss such a petition or issue a ruling, and it shall subsequently give a ruling on all such petitions properly before it as expeditiously as possible.
- (c) The board shall dismiss any such petition whose subject matter:
 - (1) Is substantially the same as that of a petition for declaratory ruling previously dismissed; or
 - (2) Was the subject of a previous ruling on the merits, absent a showing that the circumstances attending the previous ruling or dismissal have changed substantially in the intervening period.
- (d) The board shall determine whether briefs will assist in issuing a ruling on a declaratory ruling petition and in the event briefs will be received shall establish a schedule for their submission.

(Emphasis added.)

Here, the District petitioned for a ruling regarding the specific applicability of the PELRB December 7, 1976 recognition order (Case No. T-0275) in accordance with Pub 206.01 (a). Furthermore, the issue of whether paraprofessionals are included in subject bargaining unit was not “the subject of a previous ruling on the merits.” See Pub 206.01 (c) (1) and (2). Accordingly, this case is within the PELRB’s jurisdiction pursuant to Pub 206.01; and the Board’s ruling is as follows.

Discussion:

The District asks us to determine whether paraprofessionals are within the bargaining unit recognized by the PELRB on December 7, 1976 and represented by the Association. The PELRB Recognition of Exclusive Representative certifying the Association as the exclusive representative for the subject bargaining unit contains the following unit description: “[a]ll licensed professional personnel excluding superintendents, assistant superintendents, principals, curriculum coordinators, directors, teacher consultants, business administrators, or other persons employed by the State Board of Education and all other employees of the Board in accordance

with the Recognition Clause Article 1.” The District argues that under *Appeal of Londonderry Sch. Dist.*, 142 N.H. 677, 680 (1998), and *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337, 340 (2012), paraprofessionals are not included in the unit because they are not “licensed professional personnel.”

The unit in question is a “grandfathered” unit. In a case involving a grandfathered unit, the New Hampshire Supreme Court held that “[t]he composition of a bargaining unit is limited by law to those positions indentified 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 Sch Dist*, 142 N.H. 677, 680 (1998). See also *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337, 340 (2012). Here, no subsequent modifications were requested or approved by the PELRB. Our focus, therefore, is upon the language of the Recognition Clause of the CBA that was in effect at the time the original unit was recognized and certified by the PELRB.

In this case, at the time the PELRB certified the bargaining unit on December 7, 1976, the 1976-79 CBA, signed in February of 1976, was in effect. The PELRB Recognition of Exclusive Representative sets forth that the bargaining unit must be, among other things, “in accordance with the Recognition Clause Article 1” of the parties’ CBA. The Recognition Clause Article 1 of the 1976-79 CBA provides as follows:

For purposes of collective negotiations concerning salaries and direct economic benefits, the Board recognizes the Contoocook Valley Teachers’ Association as the exclusive representative for full-time professional employees of the Contoocook Valley School District Supervisory Union #47 including individuals employed by the Contoocook Valley School Board of Supervisory Union #47 the qualification for whose position are such as to require him or her to hold an appropriate credentials issued by the State Board of education under its regulation governing the certification of professional school personnel *including instructional assistants* but excluding Superintendents, Assistant Superintendents, Principals, Assistant Principals, Teaching Principals, Department Heads, Business Administrators, and other persons employed by the State Board of Education and all other employees of the Board....

See Findings of Fact at 5. We find that the “including instructional assistants” language of the Recognition Clause is clear and unambiguous and shows that, at the time the unit was certified,

instructional assistants, i.e. paraprofessionals, were included in the bargaining unit. There is also evidence that paraprofessionals were in the unit as of 1973, per the testimony of Mr. Young. See Findings of Fact at 13. Furthermore, the subsequent history of the bargaining unit supports our determination that instructional assistants were included in the unit. See *Appeal of Londonderry Sch Dist*, supra, 142 N.H. at 681 (considering parties' subsequent conduct in interpreting contract). Paraprofessionals were specifically included in a Recognition Clause of all collective bargaining agreements between the parties since 1976. Furthermore, since the unit's inception, the Association treated paraprofessionals as members of the unit. For example, the Association filed grievances and an unfair labor practice complaint on behalf of paraprofessionals, entrusted a paraprofessional with responsibilities of a member of the negotiating team and an Association Co-President, and consistently rejected the District's proposals to remove paraprofessionals from the bargaining unit. As evident from the record, the District has also treated paraprofessionals as members of the unit since at least July of 1976. See Findings of Fact at 4, 9, 11, 16-19, and 22. The foregoing shows that paraprofessionals were in the bargaining unit at the time the PELRB certified the unit in 1976 and at all time thereafter.

The District also argues that "the certification order must be interpreted as only certifying the licensed professional employees and not the paraprofessionals" because, under RSA 273:8, II,⁴ "a certification order which combined these two groups of employees, in the absence of separate affirming votes, would have been unlawful ..." See District's Post-Hearing Brief. The District states that "[i]t is reasonable to assume that the PELRB would not have certified a bargaining unit that expressly violated its own rules." Id. The District's argument misses the point for two reasons. First, it does not take into account that the unit was "grandfathered" and certified in 1976 in accordance with *State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board*, supra, 116 N.H. at 655-56. In this case, the

⁴ RSA 273-A:8, II provides in relevant part that "[t]he board may certify a bargaining unit composed of professional and non-professional employees only if both the professional and non-professional employees, voting separately, vote to join the proposed bargaining unit."

PELRB denied recognition of the bargaining unit in part because the unit contained supervisory and confidential employees and combined professionals and nonprofessionals. *Id.* at 654. The Supreme Court reversed the PELRB decision and held that the statutory grandfather clause then in effect allowed bargaining units in existence on the effective date of the chapter to “continue unmodified until valid petitions are filed as provided for in the statute. RSA 273-A:10.” See *Id.* at 655-56 (“The fact that some previously established bargaining units are inconsistent with the new requirements is the unavoidable consequence of the grandfather clause which expressly states that the act shall not ‘terminate or modify a bargaining unit’ in existence on its effective date.”). Based on this case, later clarified in *Appeal of Londonderry Sch. Dist.*, supra, 142 N.H. at 680, the RSA 273-A:8 requirement that professional and nonprofessional employees vote separately as to whether to join the unit does not apply to a unit grandfathered in 1976 containing professional and nonprofessional employees. Second, even if the 1976 PELRB certification order were unlawful, it should have been challenged in 1976 in accordance with rehearing and appeal procedures, and not 37 years after the issuance of the order. For the foregoing reasons, we find the District’s argument unpersuasive.

Accordingly, we rule that the PELRB Recognition of an Exclusive Representative (Case No. T-0275, December 1, 1976) covers paraprofessional employees.⁵

So ordered.

Date: October 7, 2013.



David J. T. Burns, Esq., Chair

By unanimous vote. Alternate Chair David J. T. Burns, Esq. presiding with Board Member Richard J. Laughton, Jr. and Board Member James M. O’Mara, Jr. also voting.

Distribution:

Kathleen C. Peahl, Esq.

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⁵ In view of our ruling, it is unnecessary to address other objections and defenses raised by the Association.