



State of New Hampshire
Public Employee Labor Relations Board

Windham School District, SAU #95

and

**Windham Education Association,
Affiliated with NHEA/NEA**

**Case No. E-0111-4
Decision No. 2015-148**

Appearances:

Michael S. Elwell, Esq., Soule, Leslie, Kidder, Sayward & Loughman,
P.L.L.C., Salem, New Hampshire, for the Windham School District, SAU
#95

James F. Allmendinger, Esq., for the Windham Education Association,
Affiliated with NHEA/NEA

Background:

On December 29, 2014, the Windham School District (District) filed a modification petition seeking to remove the positions of Directors from the existing bargaining unit represented by the Windham Education Association Affiliated with NHEA/NEA (Association or WEA). The District argues that the Director positions are newly-created positions and that the Directors are supervisory employees within the meaning of RSA 273-A:8.

The Association objected to the petition on the grounds that the positions in dispute are the previously-existing Dean positions that the District unilaterally developed into the Director positions; that the job descriptions are virtually identical, and that the District refused to negotiate changes in the terms and conditions of employment of the subject employees despite the PELRB order to the contrary. See PELRB Decision No. 2014-237 (October 14, 2014). The Association alleges that, under PELRB Decision No. 2014-237, the Director positions are within

the bargaining unit and the District was ordered to negotiate over the changes in the Directors' terms and conditions of employment. The Association requests that the petition to modify the bargaining unit be held in abeyance until the District has complied with PELRB Decision No. 2014-237.

The adjudicatory hearing was conducted on March 9, 2015 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. During the hearing, the undersigned hearing officer took official notice, under Pub 203.03 (d), of the record in PELRB Case No. E-0111-3, *Windham Education Association, affiliated with NHEA/NEA v. Windham School District, SAU 95*. The parties filed post-hearing briefs on March 27, 2015. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:I, X. The District is within the School Administrative Unit (SAU) No. 95.
2. The District operates a high school, a middle school, town elementary schools and a preschool program. See Agreed Statement of Uncontested Facts at 2. The District has approximately 2800 students.
3. Pursuant to the PELRB certification, the Association is the certified exclusive representative for "all certificated staff, school nurses, physical therapists, occupational therapists, speech pathologists, guidance counselors, special education evaluators, RTI teachers, and extra curricular personnel" employed by the District. The following employees are excluded from the bargaining unit: Superintendents, Assistant Superintendents, Principals, Assistant Principals, Title I Teachers, Literacy Success and ESOL Teachers. See PELRB Decision No. 2013-185 (October 2, 2013). This bargaining unit was last modified on October 2, 2013 when the

Association's agreed upon modification petition seeking to update the description of the existing bargaining unit was granted. See PELRB Decision No. 2013-184.

4. The Association and the District are parties to a collective bargaining agreement (CBA) effective from July 1, 2014 through June 30, 2016. The CBA was signed on May 19 & 20, 2014 and is on file with the PELRB per 273-A:16, I.

5. The parties' 2014-16 CBA, Article 18, titled "Memoranda of Understanding of Evaluation Instruments," provides in part as follows:

Within 90 days after the New Hampshire Department of Education issues its final New Hampshire Model Educator Support and Evaluation System [Report], a joint committee of two members appointed by the Association and two members appointed by the School Board will be created to review and make recommendations for amendments to the District's evaluation instruments in accordance with that model.

See District Exhibit 1.

6. Neither the Recognition clause nor any other portion of the parties' CBA refers to Deans or Directors. See Agreed Statement of Uncontested Facts at 3.

7. Prior to the 2014-15 school year, six Teachers served as Teacher-Deans (Deans) for grades 9-12 at the Windham High School (Deans of Music, Guidance, Language Arts, Social Studies, Mathematics, and Science). See Agreed Statement of Uncontested Facts at 10. Teachers are in the bargaining unit and all those serving as Deans are Teachers.

8. During each eight-period day, the Deans of Language Arts, Social Studies, Mathematics, and Science taught for three periods at grades 9-12, participated in professional learning communities for one period, had planning time for one period, performed cafeteria and other duties for one period, and performed Dean functions for 2 periods. See Agreed Statement of Uncontested Facts at 11.

9. During each eight-period day, the Dean of Music taught two periods at grades 9-12, assisted the Director of Curriculum and Instruction with curriculum development for two periods, participated in professional learning communities for one period, had planning time for

one period, and performed Dean functions for two periods. See Agreed Statement of Uncontested Facts at 12.

10. During each eight-period day, the Director of Guidance taught no classes, was responsible as a Guidance Counselor for a reduced student caseload at grades 9-12 for the equivalent of three periods, participated in professional learning communities for one period, had planning time for one period, performed cafeteria and other duties for one period, and performed Dean functions for two periods. See Agreed Statement of Uncontested Facts at 13.

11. The Dean functions included ordering books and other items, participating with the Principal and other Teachers in interviews and reference checks for teacher hiring, consulting with Teachers on a voluntary basis about curriculum and performance, proposing budgets for their departments at grades 9-12, scheduling, and addressing student placement appeals. See Agreed Statement of Uncontested Facts at 14.

12. During each eight-period day, high school Teachers who are not Deans generally teach for five periods, participate in professional learning communities for one period, have planning time for one period, and perform cafeteria and other duties for one period. See Agreed Statement of Uncontested Facts at 16.

13. Teachers are employed on 186-day contracts, with ten additional days for the Dean of Guidance, and five additional days for the other Deans. See Agreed Statement of Uncontested Facts at 15.

14. The Deans were paid a teacher's salary in accordance with the CBA wage schedule plus a \$5000 stipend.

15. Mary Anderson served as the Dean of Mathematics and Business; Bethany Bernasconi – as the Dean of Science and Engineering; Jared Cassedy – as the Dean of Living, Fine and Technical Arts; Julie Lichtmann – as the Dean (Director) of Guidance; Lisa Roeder – as

the Dean of English; and Gregory Racki – as the Dean of Social Studies and Foreign (World) Language. See District Exhibits 3A-3F.

16. The Job Description for the Dean of Mathematics & Business provides in part as follows:

SCOPE:

To work with the school community in a variety of leadership capacities, including school leadership, staff development, curriculum and program development, general management, and personal professional development to ensure the success of the mathematics and business departments at Windham High School, Windham High School as a whole, and each individual Windham High School student.

QUALIFICATIONS:

A. Education

Advanced degree in curriculum and instruction, secondary education, administration, and/or a related field. New Hampshire certification in mathematics.

B. Experience

- Minimum of five years successful teaching experience, preferably at the secondary level;
- Previous administrative experience, or potential;
- Experience with, or potential for, providing leadership in action research, active learning, team-teaching, and interdisciplinary learning;
- Experience with, or potential for, professional responsibilities in:
 - o School leadership;
 - o Faculty support, supervision, and evaluation;
 - o Curriculum and program development;
 - o School management;

PERFORMANCE RESPONSIBILITIES:

A. Essential Functions

1. Supervises the development, instruction, and assessment of curricula and daily operations of mathematics and business departments at Windham High School;..
- ...
2. Assists the administration in identifying, interviewing, selecting, and in the orientation of new staff:
 - a. Articulates professional staff competencies and essential traits;
3. Works with staff, students, and parents to foster a positive school climate by encouraging respectful, honest, appropriate, and professional approaches to individual, school and community-wide concerns;

- a. Facilitates student-teacher or parent-teacher communication, as needed;
- b. Clarifies and communicates school or district policies, as needed;
- c. Prepares reports for the Superintendent/Assistant Superintendent of Schools and the High School Principal, as requested;

...

- 6. Develops and administers the budget in assigned areas:
 - a. Maintains inventory of all textbooks and teaching materials;
- 7. Teaches three classes per semester.

B. Other Functions

Performs other tasks and assumes other responsibilities as assigned by the Principal of Windham High School.

SUPERVISES: Mathematics and Business Department Professional Staff

REPORTS TO: Windham High School Principal

TERMS OF EMPLOYMENT: 190 day contract.

District Exhibit 2A. Job Descriptions for Dean of Science & Engineering, Dean of Living, Fine, and Technical Arts, Dean of English/Language Arts, and Dean of Social Studies & World (Foreign) Language contain virtually identical qualification requirements and performance responsibilities. See District Exhibits 2A, 2B, 2C, 2E, & 2F (these exhibits are incorporated by reference in full into the Findings of Fact).

17. The 2012-14 Job Description for the Director (Dean) of Guidance position provides in part as follows:

SCOPE: To support the school's instructional program by coordinating and supervising guidance activities which are designed to assist students in their personal, social and intellectual development.

QUALIFICATIONS:

A. Education

- Certified as a Guidance Counselor by NH DOE.
- Master's Degree in the area of Student Personnel Services or Counseling.

B. Experience:

- Completed a minimum of five years of successful experience as a school guidance counselor;
- Director of Guidance or Supervisor of Student Personnel Services experience preferred;

PERFORMANCE RESPONSIBILITIES:

A. Essential Functions

- Oversees overall operation of the Guidance Office.
- Supervises and evaluates guidance counselor(s) and guidance secretaries and Registrar.
- Implements comprehensive grades 9-12 guidance programming for all students.
- Provides post-secondary information opportunities to all students.
- Maintains a personal student caseload and providing individual guidance and counseling.
- ...
- Creates, maintains, and manages the guidance budget.
- ...
- Serves on committees as needed/assigned.
- Performs other tasks and assume other responsibilities as assigned by the Building Principal or Superintendent.

B. Scheduling

- Co-facilitates the master scheduling process with the Principal for grades 9-12.
- ...
- Creates, implements, and manages the scheduling process for grades 9-11.
- With coordination from the guidance staff at the middle school, creates, implements, and manages the scheduling process for grade 8 (incoming grade 9).
- ...

SUPERVISES: Guidance Department Professional Staff

REPORTS TO: Windham High School Principal

TERMS OF EMPLOYMENT: 200 day contract.

See District Exhibit 2D.

18. Deans did not have responsibility over Teachers in other schools. Only the High School had Deans. They reported to the High School Principal. Deans did not evaluate Teachers and did not have authority to discipline them, to issue oral or written reprimands or to send a Teacher home with pay. Deans did not have authority to place a Teacher on an improvement plan. Deans did not have authority to approve a Teacher's request to leave early.

19. According to Ms. Anderson, as the Dean of Mathematics and Business, she mentored and coached Teachers to prepare them for formal observations but she did not formally observe the Teachers and did not write up observation reports. She did not have authority to send a Teacher home. Instead, she would report a Teacher to the Principal and the Principal would

send the Teacher home on her recommendation. She did not have authority to issue reprimands. If a Teacher had performance problems, she would report it to the Principal. She had no authority to approve a Teacher's request for leave. As Dean, she, among other things, assigned courses to teachers, developed the curriculum, wrote summative assessments for students, and run department meetings. She was also involved in hiring: she drafted job descriptions, vetted candidates, set up interviews, formed interview teams, and conducted background checks. She submitted all recommendations to the Principal for approval. The Principal submitted recommendations to the SAU, if he approved them.

20. Discussions on changes to evaluation procedures began in response to the New Hampshire Department of Education Report which came out in November of 2013; and the Superintendent came up with the idea to create Director positions. He related his idea to the School Board in 2013. The School Board started to consider creating Director positions in October-November of 2013.

21. The District created a task force to determine ways to respond to a waiver of "No Child Left Behind" law. In order to obtain a waiver, the New Hampshire Department of Education offered to the District to include teacher evaluation component on student testing. It is a requirement for a Title I school that teacher evaluations contain student effectiveness component. If performance goals are not met, a Teacher can be dismissed. The District has one Title I school (Golden Brook School).

22. In the past, the District used the Danielson evaluation method. The District created a Teacher Effectiveness Committee to review evaluation procedures. The Committee started its work in August of 2014. Evaluation procedures were part of the Teacher Effectiveness Committee discussions starting in the summer of 2014. At least two Teachers were on the Committee, along with the Superintendent, the Association President, the Director of Curriculum and Instruction, and Principals. According to the Superintendent, it was not the Committee

described in the CBA Article 18. This committee was larger than the one contemplated by the CBA. The Superintendent discussed with the Association the benefits of a larger Committee. The CBA Article 18 Committee was never created.

23. Teachers and administrators on the Committee decided to switch to the Marshall evaluation model. Teachers had significant input into that decision. The Committee agreed on changes to the evaluation procedure. During the 2014-15 school year, the District switched to the Marshall evaluation model. The District decided to apply the Marshall evaluation system to all schools and not just Title I school based on considerations of practicality and fairness. The new evaluation system made employee supervision less manageable. The Danielson system required one observation in three years for tenured Teachers and one observation per year for non-tenured Teachers. Under the Marshall system, the number of observations increased to 6-9 per year.

24. According to Association President John Hayward, the Association was not involved in the development of the new evaluation procedure.

25. Under the new evaluation system, the Marshall system, primary evaluators are Principals, Assistant Principals, and Directors in each respective subject area, e.g., Math, Arts, and Sciences. Secondary evaluators are usually Teachers who conduct observations. Secondary evaluators conduct observation less frequently than primary evaluators. Observations by secondary evaluators often last between 10 and 15 minutes. Observations by primary evaluators last between 45 and 60 minutes. An end-of-the year summary report is a component of each evaluation. The written observations, comments, and summary evaluation reports are placed in employees' personnel files.

26. In school year 2013-14, the total number of employees in the District was 412, out of which 201 were professional employee, e.g. teachers and guidance counselors (excluding Special Education professionals). See District Exhibit 4.

27. Under the old structure, only two people in each building did all supervisory work. The administrative staff consisted of four Principals (one per school), four Assistant Principals, and Department Heads at the middle school. The Middle School had Department Heads but not Deans. According to Principal Dan Moulis, under the Marshall system, the supervision and evaluation of staff cannot be performed without Directors because Principals and Assistant Principals have too many employees to supervise.

28. The District decided to change its organizational structure by creating six Director positions because the District believed that it needed more employees and employee time to evaluate and discipline Teachers, to direct Teachers concerning curriculum and performance, and otherwise supervise Teachers, to perform administrative functions, and to ensure curriculum and program consistency across grade levels in the District. See Agreed Statement of Uncontested Facts at 25. One of the reasons for creating the Director positions was a desire to integrate and align curriculum between school levels, especially, between the Middle and High Schools.

29. The School Board proposed a budget for 2014-15 which included funds to create the positions of Directors of Fine Arts, Guidance, Math, and Science. Voters approved the proposed budget on March 11, 2014. The School Board has proposed a budget for the 2015-16 school year which includes funds to create the positions of Directors of Language Arts and Social Studies. See Agreed Statement of Uncontested Facts at 17 & 22.

30. When Association President Hayward found out about the creation of the Director positions, he told the Superintendent that he did not want peers evaluating peers and the Superintendent agreed with him.

31. The District and SAU No. 95 currently employ eleven Directors. Seven of those Director positions existed before the 2014-15 school year. The parties do not dispute that the seven Director positions that existed before 2014-15 school year are not part of the WEA bargaining unit. They also agree that the following seven Directors should be expressly excluded

from the bargaining unit: Business Administration and Operations; Curriculum, Instruction, and Assessment/Interim High School Principal; Student Services; Human Resources; Technology; Athletics; and School Nutrition. See Agreed Statement of Uncontested Facts at 7.

32. Four Director positions were created starting in 2014-15: the Director of Mathematics, the Director of Science, the Director of Fine Arts, and the Director of Guidance. Two more Director positions have been proposed to be created starting in 2015-16: the Director of Language Arts and the Director of Social Studies. See Agreed Statement of Uncontested Facts at 5 & 6.

33. Based upon *Windham Education Association, Affiliated with NHEA/NEA v. Windham School District, SAU #95*, PELRB Decision No. 2014-237 (October 14, 2014), the four Director positions created in 2014-15 are within the WEA bargaining unit.

34. The District currently does not plan to fill Dean positions after corresponding Director positions are created. See Agreed Statement of Uncontested Facts at 23.

35. On April 15, 2014, the Superintendent approved job descriptions for the positions of Director of Mathematics (Grades 6-12); Director of Sciences (Grades 6-12); Director of Fine Arts (K-12); and Director of Guidance (K-12). See District Exhibits 6A-6D.

36. For 2014-15, the same employees who previously served as Deans of Music, Guidance, and Science applied for and were hired as the Directors of Fine Arts, Guidance, and Science. The Director of Mathematics is a different employee than the Dean of Mathematics because the Dean of Mathematics opted not to apply for the Director of Mathematics position. See Agreed Statement of Uncontested Facts at 24.

37. Under the new system, a quarter of the professional staff is supervised by Directors. In school year 2014-15, the Director of Guidance (K-12) supervised between 9 and 11 employees; the Director of Fine Arts (K-12) – 12 employees; the Director of Math/Business

(6-12) – 16 employees; and the Director of Science (6-12) – 15 employees. The District support staff is supervised by Principals and Assistant Principals.

38. The Director of Fine Arts teaches up to two periods per day at grades 9-12, has planning time for approximately 2.5 hours per week, and performs Director functions at grades K-12 the remainder of the time. See Agreed Statement of Uncontested Facts at 18.

39. The Director of Guidance teaches no periods per day, is responsible as a Guidance Counselor for a reduced student caseload at grades 9-12 for up to the equivalent for two periods per day, has planning time of approximately 2.5 hours per week, and performs director functions at grades K-12 the remainder of the time. See Agreed Statement of Uncontested Facts at 19.

40. The Directors of Mathematics and Science teach up to two periods per day at grades 6-12, have planning time of approximately 2.5 hours per week, and perform director functions at grades 6-12 the remainder of the time. See Agreed Statement of Uncontested Facts at 20.

41. The Director of Guidance is employed on a year-round (260-day) contract. The other Directors are employed on 210-day contracts. See Agreed Statement of Uncontested Facts at 21.

42. The April 15, 2014 Job Description for the Director of Mathematics provides in part as follows:

Contract Period: 11 months, 210 days, exempt
Reports to: Director of Curriculum, Instruction and Assessment [CIA] or designee
Supervises: Grades 6-12 Mathematics and Business staff
Position Goal: The Director of Mathematics will coordinate, supervise, and offer support to the mathematics teachers in grades 6-12 of the Windham School District. This position will assist the district CIA Director in developing, administering, and implementing with fidelity mathematics curriculum.

...

Qualifications: Master's Degree in Education or equivalent
Administrative or supervisory experience preferred
Experience: Minimum of five years of successful experience as a mathematics teacher or instructor in a similar field.

Licensure/Certification Requirements:

NH Certified as a Mathematics Teacher 5-12 and Administrative certificate completed (or in process)

Evaluation: Performance of position responsibilities will be evaluated annually in accordance with the approved administrative procedure for staff evaluation

Other Considerations and Requirements:

...
Such alternatives to the above qualifications as the Superintendent may find appropriate and acceptable

...

General Duties, at the discretion of the District, may include:

1. Oversee operation of the grades 6-12 mathematics and business curriculum and instruction in collaboration with the building administrators and Director of CIA
2. Participates and facilitates [sic] faculty staff department meetings
3. Work closely with building principals to ensure the successful scheduling of appropriate mathematics and business related course offerings as it relates to the master schedule
4. Supervise and evaluate grades 6-12 mathematics and business teachers and support staff. Due to the number of employees to be evaluated, the Director will evaluate some or all such employees, but the building principal may evaluate some of them. Place such employees on improvement plans and monitor their progress, as needed
5. Implements comprehensive grades 6-12 mathematics and business programming for all students
6. May be required to carry a course load of 2 classes per semester
7. Actively participate in the mathematics and business budget process
8. Assist with staff professional development in the content area
9. Serve and lead committees as needed/assigned
10. Reprimand grades 6-12 mathematics and business teachers and support staff, as needed. Recommend suspensions, dismissals and non-renewals of such employees to the building administrator and/or superintendent, as needed
11. Perform other tasks and assume other responsibilities as assigned by the building administrator, Director of CIA, or Superintendent
12. Recruit grades 6-12 mathematics and business teachers and support staff, and recommend hiring of such employees to the building administrator and superintendent

...

See District Exhibit 6A. The April 15, 2014 Job Descriptions for Director of Sciences (Grades 6-12) and Director of Fine Arts (K-12) set forth the same contract period (210 days) and contain substantially similar qualification, experience, and certification requirements, and performance

responsibilities. See School District Exhibits 6B and 6C (incorporated by reference in full into the Findings of Fact).

43. Under the April 15, 2014 Job Description, the Director of Guidance reports to the Director of Student Services and “supervises” K-12 guidance staff. The candidate for the position is required to hold Master’s Degree in the Counseling, Mental Health or related field and Masters/CAGS in Leadership. Administrative or supervisory experience is preferred but not required. The job description provides that the candidate must be “NH Certified as a Director of Guidance (or Guidance Counselor with director certification in process)”. The Director of Guidance responsibilities include, among others, the following: “oversee operation of the K-12 Guidance Program”; participate in faculty staff department meetings; “[s]upervise and evaluate grades K-12 guidance counselors and guidance support staff”; place “employees on performance improvement plans and monitor their progress, as needed”; create, maintain, and manage the guidance budget in all schools; “[r]eprimand grades K-12 guidance counselors and guidance support staff, as needed”; “[r]ecommend suspensions, dismissals and non-renewals of such employees to the building administrator and/or superintendent, as needed”; “[r]ecruit grades K-12 guidance counselors and guidance support staff and recommend hiring of such employees to the building administrator and superintendent”; and co-facilitate the master scheduling process with the Principal for grades 9-12. The job description provides that “[d]ue to the number of employees to be evaluated, the Director will evaluate some or all such employees, but the building principal may evaluate some of them.” See District Exhibit 6D (incorporated by reference into the Findings of Fact).

44. Directors’ salaries are currently set by the Superintendent.

45. Catherine Croteau signed the Administrator Employment Agreement (AEA) for the position of Director of Mathematics on May 16, 2014 and Bethany Bernasconi signed an AEA for the position of Director of Sciences on May 9, 2014. Jared Cassedy signed an AEA for

the position of Director of Fine Arts on May 8, 2014; and Julie Lichtmann signed an AEA for the position of Director of Guidance on May 9, 2014. Each AEA sets out benefits in Appendix A, including the following: medical, dental, life, and long term disability insurance, longevity, holiday, vacation, sick and other leave, salary increases, and retirement severance. See District Exhibits 7A-7D.

46. At the time of hearing, the District did not have Directors of Fine Arts and Social Studies.

47. Directors evaluate, discipline and supervise Teachers. If a Teacher has a problem, he/she can go either to the Director, the Principal, or the Assistant Principal. Directors have authority to issue oral and written reprimands and, if necessary, send a teacher home with pay. Directors have authority to make recommendations to the administration regarding suspension or termination of a Teacher. Directors participate in the weekly leadership meetings with the Director of Curriculum and Instruction. In subject areas that do not have Directors, these tasks are performed by Principals.

48. A candidate for a Director position must either hold an administrative certification, in addition to a teaching certification, or be working toward it.

49. Three of the four existing Directors hold administrative certifications.

50. Bethany Bernasconi is the Director of Science responsible for grades 6-12. She has been employed by the District for six years. She became a Dean after working three years as a Teacher. As Director, she reports to the Director of Curriculum and Instruction.

51. Teaching takes up around a quarter of Ms. Bernasconi's time and, as Director, she has a high degree of discretion as to what to do with the remainder of her time: among other things, she performs evaluations, advises Teachers, and performs other supervisory and non-supervisory tasks.

52. Ms. Bernasconi is a primary and secondary evaluator. As evaluator, she sets and updates the goals for Teachers. She discusses self-evaluations with teachers and conducts follow-up meetings. She conducts around 6 to 9 observations of each Teacher per year and will prepare summative evaluations that are placed in Teachers' personnel files. As Director, she decides whether to place a Teacher on an improvement plan.

53. As Director, Ms. Bernasconi prepares ads for job openings, leads job interview sessions, and makes recommendations regarding hiring to the Superintendent. Deans played a similar role in hiring, except the Principal and not Deans made hiring recommendations to the Superintendent.

54. As Director, she has final authority on Teacher assignments. She makes decisions on assignments based on a Teacher's certification, her observations, and strength and weaknesses of a Teacher. As Dean, she had to make recommendations regarding course assignment to the Principal and the Principal assigned the courses.

55. As Director, Ms. Bernasconi develops training plans and decides how, when, and on what subject the training will be delivered.

56. Ms. Bernasconi does not consider Teachers to be her colleagues and believes that she has more in common with the District administration. She believes that being in the same bargaining unit with Teachers creates a conflict of interest.

57. Ms. Lightmann is the Director of Guidance for grades K-12. She was a Dean at the High School for 3 years. As Dean, she reported to the Principal. As Director, she reports to the Director of Special Services. As Dean, she was paid in accordance with the CBA pay scale plus a stipend. As a Director, she has a salary.

58. As Director, Ms. Lightmann still works with students. Her guidance caseload constitutes approximately 25% of her work day. She has discretion as to how to allocate the rest

of her work time. Her Director responsibilities include conducting evaluations and preparing budget. She works at four schools.

59. Ms. Lightmann is the primary evaluator of grades K-12 Guidance Counselors. There are nine Guidance Counselors under her supervision. She is also a secondary evaluator for six more employees. She sets goals four times per year for non-tenured Teachers/Counselors and meets with them more frequently than with tenured Teachers/Counselors. According to Ms. Lightmann, working on employee self-evaluations is very time consuming. She also conducts follow up meetings on annual goals. She conducts seven to nine observations of non-tenured employees and six to eight observations of tenured employees per year. She also meets with employees to discuss their evaluations, and makes commendations and recommendations. She also performs a summative evaluation, typically in spring. Observations write-ups, comments and summative evaluation reports are placed in Teachers/Guidance Counselors' personnel files.

60. As Director, Ms. Lightmann decides whether a Counselor should be placed on an improvement plan. She also has authority to issue oral and written reprimands and can send an employee home with pay, if necessary. Like Principals, she has authority to recommend suspension without pay and termination. She has authority to grant an employee's request to leave early. As Dean, she had to report such requests to the Principal who made decisions.

61. As Director, Ms. Lightmann develops job description for open positions, vets applicants, selects an interview committee and makes recommendations to the Superintendent. As Dean, she made hiring recommendations to the Principal, who would decide whether to make recommendations to the Superintendent.

62. As Director, she has authority to develop a training plan. Professional development of Guidance Counselors, apart from training required by the District, is her responsibility. She looks at the employees' annual goals to determine the appropriate professional development.

63. At the High School, if the Principal and Assistant Principal are out, she takes over their responsibilities. She is the third person in the “chain-of-command.”

64. Ms. Lightmann believes that her position has more in common with the administration than with Teachers; that being in the same bargaining unit with the employees she is supposed to evaluate creates a conflict of interest; and that she will not be as effective as she must be in performance of her duties if she remains in the WEA bargaining unit.

65. When the Superintendent decides whether to renew/renominate a teacher, he relies on recommendations from Directors. According to Superintendent Winfried Feneberg, Directors’ recommendations on renominations carry significant weight. Primary evaluators, including Directors, are required to be present at the School Board renomination meetings. The School Board members ask primary evaluators questions about evaluatees and give weight to their recommendations. According to the Superintendent, Directors’ recommendations regarding hiring, suspension, and termination will also be given “great weight.”

66. After the Superintendent reviews hiring recommendations from Directors and Principals, he personally interviews every candidate and decides whether to nominate a candidate. He can disregard a Director’s recommendation, in which case, he tells the Director to find another candidate.

67. Superintendent Feneberg believes that placing Directors in the same bargaining unit with the employee they evaluate and supervise creates a conflict of interest and division of loyalties.

Decision and Order

Decision Summary:

There has been a sufficient change of circumstances since the most recent representation proceedings to justify a modification of the bargaining unit in this case. Directors are “[p]ersons exercising supervisory authority involving the significant exercise of discretion” within the

meaning of RSA 273-A:8, II and are, therefore, excluded from the bargaining unit represented by the Association.

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:

The District argues that the allegedly newly-created positions of Directors should be removed from the existing bargaining unit because these positions are supervisory within the meaning of RSA 273-A:8, II.

The legislature has vested the PELRB with primary and exclusive authority to determine the composition of and certify bargaining units. See RSA 273-A:8, I.¹ See also *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012); and *Appeal of the University System of N.H.*, 120 N.H. 853, 854 (1980). Modifications of existing bargaining units are governed by Pub 302.05, which provides in relevant part as follows:

(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.

Pub 302.05. The language of Pub 302.05 leaves the PELRB discretion in deciding whether or not to grant petitions to modify. *Appeal of Bow School District*, supra, 134 N.H. at 73.

¹ "The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10..." RSA 273-A:8, I.

1. Pub 302.05 Change in Circumstances

In accordance with Pub 302.05, contested modification petitions must be supported by evidence demonstrating either that the circumstances have changed since the time of the prior bargaining unit proceedings or that “a prior unit recognized under the provisions of RSA 273-A:1” is incorrect to the extent that modification is required. See *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (September 25, 2008) (modification petition dismissed because there has been no change in circumstances since time of prior bargaining unit proceedings). See also *Salem Public Administrators’ Association and Town of Salem*, PELRB Decision No. 2009-171 (August 18, 2009) (union’s modification petition denied because there was “insufficient evidence that there has been a change in circumstances since the most recent proceedings involving this bargaining unit”); *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182 (September 3, 2009) (union’s modification petition denied because change in employment status from probationary to permanent is not material change in circumstances warranting modification). Creation of new positions, or restructuring of existing positions, is a change in circumstances that may warrant modification of an existing bargaining unit.

In this case, there has been a sufficient change in circumstances since the most recent representation proceedings to justify a modification of the bargaining unit. The record shows that, in order to obtain a waiver of the “No Child Left Behind,” the District decided to modify its performance evaluation system which led to the need for more supervisors. This need, along with the desire to integrate and align curriculum between school levels, especially between the middle and high schools, led to the creation of Director positions. The existing Dean positions were modified into Director positions for which the District created new job descriptions containing new duties and responsibilities, including conducting evaluations of Teachers and placing Teachers on improvement plans and issuing discipline, if necessary. Although some of the

Directors' duties and responsibilities were previously performed by Deans, many of the Directors' duties were not, including supervisory duties in the areas of evaluation and discipline. These changes occurred after the most recent representation proceeding affecting the subject bargaining unit and they are material changes sufficient to satisfy the requirements of Pub 302.05. Therefore, the District satisfied the threshold requirement that a party petitioning for modification of a bargaining unit demonstrate that the circumstances have changed since the time of the prior representation proceedings.

2. RSA 273-A:8, II Supervisory Employees.

RSA 273-A:8, II provides that “[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.” Statutory 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. 429, 432 (1999). See also *New England Police Benevolent Association, Inc., Local 50 et al. v. State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169; *New England Police Benevolent Association, IUPA, AFL-CIO v. Town of Hillsborough*; PELRB Decision No. 2010-112.

A supervisory relationship within the meaning of RSA 273-A:8, II exists “when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion.” *International Chemical Workers Union Council and Hillsborough County Nursing Home*, PELRB Decision No. 1999-079. In determining whether an employee exercises supervisory authority involving the significant exercise of discretion, 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*, supra, 144 N.H. at 432. See also *NEPBA, Inc. Local 40/NH Fish & Game*

Conservation Officers et al. v. SEA/SEIU Local 1984, PELRB Decision No. 2006-174; *Teamsters Local/Plaistow Town Employees v. Town of Plaistow*, PELRB Decision No. 2010-062. A proper assessment of whether a position is supervisory “requires consideration of matters such as the nature, extent, character and quality of [employee’s] authority and involvement in the areas of discipline, evaluations, and hiring.” *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. “[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. 607, 611 (1993). See also *Hampstead Police Union, NEPBA Local 37 and Town of Hampstead*, PELRB Decision No. 2008-071.

Here, the evidence demonstrates that the Directors evaluate Teachers and their evaluations are placed in Teachers’ personnel files; they have authority to discipline Teachers (issue oral and written warnings) and to recommend suspension and termination of Teachers. Directors are responsible for scheduling and course assignments and have authority to place a Teacher on an improvement plan. They also have authority to approve a Teacher’s request to leave early. The Directors actively participate in the hiring process and have authority to recommend hiring. A Director has authority to send a teacher home with pay, if necessary. Moreover, according to the Superintendent, the Directors’ recommendations on discipline, termination, and hiring carry significant weight. All these factors indicate that keeping Directors in the same bargaining unit with Teachers, the employees they supervise and evaluate, will likely create conflicts between the two groups because of the differing duties and relationships which characterize each group.

For the foregoing reasons, the District’s petition for modification is granted and the Directors are removed from the existing bargaining unit represented by the Association. The bargaining unit description is modified as follows:

Bargaining Unit: All certificated staff, school nurses, physical therapists, occupational therapists, speech pathologists, guidance counselors, special education evaluators, RTI teachers, and extra curricular personnel employed by the Windham School District.

Excluded: Superintendents, Assistant Superintendents, Principals, Assistant Principals, Directors, Title 1 Teachers, Literacy Success and ESOL Teachers.


Finally, in the Agreed Statement of Contested Fact, at 4, the parties set forth the following question:

Whether there is an obligation of the School District to negotiate the creation of new positions and changes in the positions comprising the bargaining unit of the Association and impact of those changes; whether, if so, that obligation is relevant to the modification of the bargaining unit; and if there is such an obligation and it is relevant to modification of the bargaining unit, whether that obligation has been met.

This question is not an appropriate question to be raised in the modification proceedings as modification petitions are governed by Pub 302.05 that does not address issues concerning the parties' bargaining obligations. Therefore, the issue of whether the District has an obligation to negotiate the changes to the positions and/or their impact is not relevant to the modification of the bargaining unit but, instead, should, if necessary, be raised in unfair labor practice proceedings.

So ordered.

June 30, 2015


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