



NH Supreme Court reversed this decision on June 3, 1998, Slip Opinion No. 96-403, 142 NH 837 (1998).

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SOMERSWORTH ASSOCIATION OF  
EDUCATORS, NEA/NEW HAMPSHIRE

Complainant

v.

SOMERSWORTH SCHOOL BOARD

Respondent

CASE NO. T-0258:13

DECISION NO. 96-021

APPEARANCES

Representing Somersworth Association:

Steven Sacks, Esq.

Representing Somersworth School Board:

Michael Elwell, Esq.

Also appearing:

Brian Beeler, Somersworth School Board

Gary Tuttle, Self

Terry Dostie, Somersworth Association

Ted Wells, UniServ Director

BACKGROUND

The Somersworth Association of Educators, NEA-New Hampshire (Association) filed unfair labor practice (ULP) charges against the Somersworth School Board (Board) on November 6, 1995 alleging a violation of RSA 273-A:5 I (h) relating to a breach of contract based on a refusal to process (arbitrate) a grievance and untimely notice on non-renewal. The Association filed its answer on November 21, 1995. After motions to continue sought by and

granted to the parties, the PELRB heard this matter on March 12, 1996.

FINDINGS OF FACT

1. The Somersworth School Board is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Somersworth Association of Educators, NEA-New Hampshire, is the duly certified bargaining agent for all professional personnel, except persons classified as administrators "whose employment shall require them to hold a professional certificate issued by the State Board of Education." (Association Exhibit No. 9, Article I.)
3. The Association and the Board are parties to a collective bargaining agreement (CBA) for the period July 1, 1994 until June 30, 1998. (Association Exhibit No. 9.) In it, the Board has recognized the Association as the exclusive representative of professional personnel. (Article I). The terms "teacher" and "professional employee" are both defined to mean "any member of the group of professional personnel." [Article I, § C (1).] Article IV of the CBA contains a grievance procedure which defines "grievance" as " a complaint by a teacher or by the Association concerning an alleged violation or an alleged inequitable application of any of the provisions of this Agreement or of written Board policy concerning the terms or conditions of employment,..." Article V, § D (4) and (5) of the CBA provide that there shall be no reprisals because a teacher has been a member or activist in the Association or has processed a grievance, nor shall any teacher be disciplined except for just cause. The salaries for "all professional employees" of the District are set forth in Article XIV of the CBA and appendices thereto. Finally, Article VI of the CBA provides:

Teachers who are not to be reemployed in in the District shall be notified in writing no later than March 30 or the date established by New Hampshire statute. No teacher shall be non-renewed, suspended, reduced in rank or compensation without a due process hearing before the Board under the guidelines estab-

lished by appropriate state laws. All information forming the basis for such action shall be made known to the teacher prior to such hearing.

4. Gary Tuttle was employed by the Board as "job coordinator" from 1990 through the end of the 1994-95 school year. In this capacity, he worked with students, wrote objectives for individual education plans (IEPs), served as a liaison to employers in the community, met with families and teachers, and assisted students in a classroom setting. Tuttle was given the same individual contract as was given to teachers and was paid under the teacher compensation schedule of the CBA, notwithstanding the fact that he did not have credentials as a certified teacher from the State Board of Education. (Association Exhibit Nos. 2-a through 2-e. and Exhibit "D" to the ULP.) In other respects, Tuttle was treated as a "regular" teacher, i.e., he was evaluated under the same standards and forms as a teacher (Association Exhibit Nos. 3-a through 3-i), was credited with staff development hours (Association Exhibit Nos 4-a through 4-c) and had annual professional growth plans (Association Exhibit Nos. 4-e through 4-i). He also was consistently accorded benefits under the teachers' contract in the form of personal, emergency and bereavement days (Association Exhibit Nos. 5-a through 5-e). He was named the Association for Retarded Citizens "Teacher of the year" in 1993. (Emphasis added, Association Nos. 6-g and 6-h.)
5. In 1994, the Chairperson of the Somersworth School Board recognized Tuttle for his contributions to the "profession." (Emphasis added, Association Exhibit No. 6-i).
6. On December 20, 1994, Tuttle filed a grievance which was processed and disposed of under the terms of the grievance procedure of the CBA without objection from the public employer that Tuttle was without standing to raise that grievance or to avail himself of rights under the CBA. (Association Exhibit No. 8.)
7. During the term of his employment, Tuttle performed extra duties, i.e., lunchroom duty, on the teachers' duty roster, was required to report to the school building the same time as teachers, and attended

teachers' faculty meetings. Likewise, he received the benefits of duty free lunch, preparation time and course reimbursement under the CBA, as did the classroom teachers.

8. On or about March 29, 1995 the Superintendent prepared a lay-off letter to Tuttle in "accordance with RSA 189:14-A," to be effective June 30, 1995. (Association Exhibit No. 1.) Tuttle's unrefuted testimony was that he was out of school for surgery from March 20th to April 4th and that he did not receive the RSA 189:14-A notice until May 18, 1995 when it was given to him, in hand, by the Superintendent.
9. Tuttle filed a grievance about the lay-off notice on June 1, 1995 (Exhibit "A" to ULP.) claiming violations of Article VI (Termination of Contract) and Article XIII (Reductions in Force) of the CBA. The Superintendent denied the grievance on June 16, 1995 saying that "reasonable efforts were made to notify Mr. Tuttle and Mr. Tuttle may not be covered by this CBA." In his testimony before the PELRB the Superintendent said the lay-off/job elimination was caused by a projected drop in the program Tuttle administered for the 1995-96 school year and that his former subordinate, a para-professional, was to be given those responsibilities for approximately five students in the 1995-96 school year.
10. On July 11, 1995, Denis Messier, Chair of the Somersworth School Board, wrote Tuttle denying the grievance because Tuttle was an "uncertified employee of the School District [and] not a member of the bargaining unit." Conversely, nurses are not certified by the State Board of Education, received teachers contracts in Somersworth, and are, according to the Superintendent's testimony, considered "teachers" under the CBA.

#### DECISION AND ORDER

We disagree with the assertion of the Board's counsel that this case is distinguishable from Londonderry Education Association, Decision No. 94-18 (March 10, 1994). Unlike Londonderry where there were nine years of uncontroverted practices of treating a non-certified employee, as to salary, benefits and expectations, the same as a certified teacher, here the practice endured for five years. That is a distinction

without a difference. This is a case where, if it looks like a rose, smells like a rose and feels like a rose, it must be a rose. Tuttle must have been being treated as a teacher and member of the bargaining unit during his term as an employee of the Board.

We find the circumstances related in Finding Nos. 4 and 7, above, to be compelling and convincing evidence that Tuttle was, at all times during his employment, treated as a member of the bargaining unit. His salary, insurance, other benefits, course reimbursement, form of individual contract, evaluation procedures, evaluation forms, work place and work hours, requirements for staff development, attendance at faculty meetings, accrual of personal, emergency and bereavement leaves, responsibilities for extra duties and entitlement to duty free and preparation periods were all similar to that accorded to certified teachers in the bargaining unit. Where these matters were covered by the CBA, Tuttle's benefits, in the broadest sense, were identical to the teachers' benefits.

If the foregoing comparisons were not enough to be convincing by themselves, we find that the Board has estopped itself from asserting its defenses that Tuttle was not in or treated as a member of the bargaining unit by two of its actions. First, in Finding No. 5, Tuttle was recognized for his contributions to the "profession." The terms "teacher" "professional personnel" and "professional employee" are used virtually interchangeably in the contract. Article I, Section C of the CBA says "the teacher" and "the professional employee" shall "mean any member of the group of professional personnel." Nurses are included among that number even though they are not certified by the State Board of Education. We cannot ignore the breadth of the definition for other employees and the narrowness with which the Board is attempting to construe it relative to Mr. Tuttle. Second, the Board or its agents permitted Tuttle to assert, process and have settled an earlier grievance in December of 1994. Finding No. 6. It is inconsistent for them to interpose an objection as to his standing at this point given the overwhelming evidence as to how they have treated him for 4 1/2 years prior to his RSA 189:14-A letter which, in itself, was designed to meet a standard for certified and tenured teachers.

In Londonderry, supra, we said that "we cannot countenance the inconsistency of nine years of treatment as a full-fledged teacher versus the denial of rights once the position was eliminated." We see no reason to change for five years of equally consistent behavior on the part of the public employer in this case. If Tuttle was a public employee treated as a member

of the bargaining unit for nearly five years before the RSA 189:4-A letter was prepared on March 29, 1995, he was just as much a covered employee after it was written and delivered. The Board may not turn on and off its recognition of an employee relative to his benefits and entitlements under a CBA at its whim. It has established a multi-year course of behavior towards Tuttle; it must maintain that course of behavior now that Tuttle has a complaint that the Board has violated his rights under the CBA.

The acts complained of are found to have been violative of RSA 273-A:5 I (h) in that the Board or its agents breached the contract when it/they refused to process Tuttle's grievance. The Board and its agents are directed (1) to CEASE AND DESIST from refusing to process Tuttle's grievance and (2) to inform this agency of the disposition of this case whether by agreement of the parties or by adjudication under the arbitration procedures of the CBA.

So ordered.

Signed this 8th day of April, 1996.

  
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JACK BUCKLEY  
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding.  
Members Richard Molan and Frances LeFavour present and voting.