

**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Bow School District	*
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Petitioner	*
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Bow Educational Support Staff/ NEA-NH	*
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Respondent	*
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CASE No. M-0713-1  
DECISION No. 2002-033

ORDER

REPRESENTATIVES

For Bow School District:  
Margaret-Ann Moran, Esq.

For the Bow Educational Support Staff Association:  
Steven R. Sacks, Esq., NEA-NH

Also Appearing as Witnesses:  
Peter A. Chamberlin  
Deborah Shaw  
Nancy Dupuis  
Fran Ladd  
Diane Cooper

Kathleen Bell  
Patricia Carignan  
Susanne Fournier  
Ann Brannock  
Wally Cummings

BACKGROUND

The Bow School District (hereinafter referred to as the "District") filed a Modification Petition with the Public Employee Labor Relations Board (PELRB) on October 15, 2001 seeking to remove the positions of "Kitchen Support Staff/Food Service Staff" from an existing bargaining unit.

The existing bargaining unit, entitled "Bow Educational Support Staff / NEA-NH/NEA" (hereinafter referred to as the "Association") filed its objection on October 22, 2001. Its relevant objection asserts that there is a self-felt community of interest in existence among all employees within the existing unit and that a community of interest exists, in fact, among the kitchen support staff/food service personnel and other members within the existing unit. The Association also makes a statement in its objection that there has been no change in circumstances since the unit was formed by mutual agreement in 1995. A Pre-Hearing Conference was conducted on November 20, 2002. (See Decision #2001-123).

The Association filed a Motion to Dismiss on December 4, 2001 and the District's Objection was filed on December 18, 2001, however both parties later agreed to forgo their intention to submit stipulated facts and legal memoranda to allow consideration of a potentially dispositive motion prior to the evidentiary hearing. Final Witness and Exhibit Lists were exchanged and an evidentiary hearing was conducted before the undersigned Hearings Officer on January 29, 2002. Both parties were represented by counsel, presented exhibits and witness testimony through direct examination and cross-examination and otherwise participated fully during the hearing.

At the outset of the hearing, the District filed a Motion in Limine upon which, after discussion with counsel, the Hearings Officer reserved finding until the case evolved. Later, the Hearings Officer denied the introduction of written affidavits of persons not present to give testimony on behalf of the Association. Also, upon the request of both parties, witnesses were sequestered. With both counsel waiving any need for prior notice, official notice was taken of a so-called "Tally Sheet" used at the previous bargaining unit election and the certification thereafter issued by the PELRB. That document became District Exhibit #19. Following the presentation of all evidence, both counsel made oral closings and the record was left open until February 18, 2002 for the submission of Legal Memoranda by both counsel. A subsequent extension until February 22, 2002 for submission of Legal Memoranda was granted upon receipt of a request by the Association representing the assent of the District's Counsel.

#### FINDINGS OF FACT

1. The Petitioner, Bow School District, employs persons to provide educational support services within the public schools located within the district and therefore qualifies as a public employer within the meaning of RSA 273-A:1 X.
2. The Respondent, Bow Educational Support Staff/NEA-NH is the exclusive bargaining representative of a bargaining unit comprised of certain employees of the Petitioner that may be generally classified within the titles of educational aides or assistants, secretaries and kitchen or food service workers who perform work at the three schools operated by the Bow School District.

3. Submitted by mutual agreement, the original bargaining unit representing "Secretaries, Aides and Kitchen Staff" was initially certified without an evidentiary hearing, on May 5, 1995. (Association Exhibit #4). It was modified, again by agreement of the District and the Union and without an evidentiary hearing, to remove those kitchen workers in the position of "Head Cook" and this modified unit was certified by the PELRB on September 11, 2001. (PELRB Decision # 2001-083).
4. The parties concluded negotiations of the relevant collective bargaining agreement (CBA), covering "secretaries, assistant and kitchen staff", with the execution of that document on June 10, 1999. (Association Exhibit #3, Article I, Section 1.1- Recognition).
5. Arthur Chamberlin has been the Business Administrator in the Bow School District since 1992, prior to the original certification of this bargaining unit. He testified that while the job descriptions entered into evidence as District Exhibits #12-#18 were put into written form in 1999, the duties have been essentially the same since prior to the original certification of this bargaining unit. Fifteen so-called "kitchen workers" provide meals to students within the Bow School District at three distinct school locations.
6. Mr. Chamberlin also testified that since, at least 1995, of the three major employee groups that comprised the bargaining unit, the kitchen workers reported to him and the secretaries and assistants reported to the School Superintendent.
7. The District has a separate employee manual for kitchen workers entitled "Bow School District Food Service Handbook" (District Exhibit #11). Included in that handbook are fourteen "principal(sic) rules" that Mr. Chamberlin testified applied to all three major employee groups. The District rules as relate to employee evaluation forms, absences and tardiness, and school closings similarly are applied to all three groups. Except for persons employed as full time secretaries, the work year for employees within these three groups work approximately the same number of days related to the school year operation.
8. There are characteristics of kitchen workers that distinguish them from persons employed as secretaries and assistants that include: wearing a uniform, maintaining short and unpolished fingernails, working different hours in shorter working days, working in kitchen areas and not classrooms or offices; receiving wages with a stipend and not part of a wage step schedule; wearing their hair up, having different lunch periods and lacking the requirement of a high school diploma to be hired.
9. One of the fifteen kitchen workers, Patricia Carignan, was a member of the Union representing the bargaining unit, having joined in or about September

2001. Ms. Carignan testified that she did so only to find out what was going on with negotiations and to be a voice for the kitchen staff. She still supports withdrawal of the kitchen workers from the bargaining unit. She testified that she tried to become a member of the negotiating team (see District Exhibit 4) and was unsuccessful. (see District Exhibit #5). While she agreed that she supported the two issues stated in the contents of the petition, *i.e.* salary and working environment, she also provided other reasons for her belief that the groups should be separated. She testified that the jobs were different. She cited that the kitchen staff operated industrial machines, dealt with children differently than assistants, were involved with the safe handling of food, and with uniform and personal appearance restrictions that did not apply to secretaries or assistants. She testified that there was no interaction between the groups. Under cross-examination she agreed with Union counsel's assertion that the kitchen staff had an educational function

10. There is little, if any, interaction of the kitchen workers with either the secretaries or the assistants other than as the latter two groups may come to the kitchen areas for meal periods.
11. In the Summer of 1999, all of the kitchen workers within the bargaining unit employed at that time signed a petition indicating unanimous support for the "Withdrawal of the Bow Street District Food Service Staff from the Bow Educational Support Staff Union". (District Exhibit #1).
12. On or about October 9, 2000 the president of the Union wrote a memorandum to the kitchen workers that referred to them collectively and informing the kitchen workers that "IF THE MEMBERSHIP IN THE CAFETERIA DOES NOT INCREASE THE UNION WILL HAVE NO CHOICE BUT TO SEEK ASSISTANCE IN REMOVING FOOD SERVICE FROM THE BARGAINING UNIT." (District Exhibit #2, emphasis appearing in the original).
13. During the summer of 2001, the kitchen workers, by the hand of Diane MacDougall, the Bow Memorial School kitchen supervisor, sought assistance in withdrawing from the bargaining unit from the Public Employee Labor Relations Board (see District Exhibits #3 and #4), and from the Union (see District Exhibit #5) and, upon the refusal of the Union to file a Modification Petition, Nancy Dupuis, the Bow Elementary School Kitchen Manager, sought the assistance of the District to file a Modification Petition. (see District Exhibit #6).
14. The Union forwarded a proposed Modification Petition to the District on or about July 11, 2001 to exclude certain kitchen workers from the bargaining unit. The District responded (see District Exhibit #8) by expressing the desire of all of its kitchen workers to withdraw from the "Bow Education Support Staff group", soliciting the Union's agreement and also agreeing to the

Union's present Modification Petition while reserving future action on behalf of all kitchen workers.

15. The Union's Modification Petition was deemed filed with the PELRB on September 11, 2001.
16. Deborah Shaw was employed from 1997 to June 1999 as a kitchen helper and raised the issue of incoming food service workers being paid more than incumbents when a job was posted on or about June 2, 1998 with her, then, direct supervisor, Diane MacDougall. It was from subsequent discussions of that issue that Ms. Shaw learned that the members of the kitchen staff were represented by a Union.
17. Nancy Dupuis has been employed as a kitchen worker since 1994 and testified that she was a member of the Union for approximately one week in 1996. She also testified that she developed a petition for withdrawal of the kitchen workers from the Union, commonly referred to as "BESS", and circulated it for signatures with two other, then, members of the bargaining unit. As a member of the bargaining unit she received a memorandum from the Union president in October 2000 (District Exhibit #2) that she interpreted to be a threat. Her testimony expressed the sentiment that she felt that food service was different from the services provided by secretaries and assistants. She cited differences between the groups based upon the number of hours worked by members of each group indicating that while secretaries may work six or seven hours a day, kitchen workers' hours varied from three hours through six hours daily. She also testified that she felt there was no common interest between the kitchen staff and the other groups. Under cross-examination she was offered a hypothetical that "If the Union had negotiated a \$3.00 per hour raise, the petition would not have been necessary, would it?" She then testified that it would not, but qualified her answer by indicating that she didn't believe that the kitchen staff should ever have been joined together with the secretaries and assistants.
18. Francis Ladd is an Assistant Cook and testified that the written job description (District Exhibit #12) was a fair representation of her duties. She testified that while not a member of the Union she was a member of the bargaining unit and also received the 10/9/00 memorandum from the Union president. Her reaction to the contents of that document was fear that she would lose her benefits, particularly her health insurance. She testified that she was "startled" at the message in the memorandum. She also testified that she was a signatory to the petition and had done so because while she had attended two meetings of the Union, she didn't want to be part of it. Her testimony established that she felt no connection with the secretary and assistant groups. She testified that the only interaction with those two groups was when their members came down for food and that the only interaction with the students was when they received their breakfast or lunch. On cross-examination, Ms. Ladd rejected the

offered hypothetical proposing that if the Union had obtained a \$3 per hour raise for the kitchen workers she would not have signed the petition to withdraw and would not be of a mind to withdraw now.

19. Diane Cooper is an Assistant Cook and has worked for the District for five years. She testified that she signed the petition and understood that to be an expression that "We wanted to be out of the unit and no one wanted to be in the Union". She stated that her testimony was a reaffirmation of wanting to be out of the bargaining unit. In addition to testifying that she didn't feel the Union had satisfactorily improved the wages or working environment for kitchen workers, she testified that she didn't believe that the kitchen workers had anything in common with the two other groups. She also expressed the belief that the kitchen group should never have been put in together in the original formation of the bargaining unit. She expressed that she "doesn't really understand the difference between the Union and the bargaining unit".
20. Kathleen Bell has been employed as a "Helper" in the high school kitchen for one year and is a signatory to the petition. She testified that "didn't see why [the kitchen workers] should be in". She also testified that the food service people wanted to get out of the Union and were told they could not. Under cross-examination she stated that the "Union hasn't done anything for us". She further expressed her belief that the District kitchen workers were not paid as much as those in other school districts because of their inclusion in a unionized bargaining unit. She testified she was unsure of the exact composition of the bargaining unit and felt that the Union was "invisible".
21. Suzanne Fournier has been a Kitchen Assistant for one year and is a signatory to the petition. She testified that she was in attendance at the hearing because she didn't feel the kitchen workers had anything in common with the other two groups. Under cross-examination, she responded that salary is one reason and another reason was that the groups have nothing in common.
22. Ann Brannock has been employed in the District for 22 years and is presently a program assistant. She is president of the BESS and a member of the bargaining team. She testified that food service workers had a representative member on the contract negotiating team for the first and second contracts but not on the present one.
23. Ms. Brannock testified that her intent in forwarding the 10/9/00 memorandum to kitchen workers was to give them a "wake-up call" as she felt they needed to be more involved with BESS. She testified that if the bargaining unit composition was modified to exclude the kitchen workers then management could give a greater bargaining benefit to the kitchen workers.

24. At the time she received the letter from Ms. Carrignan (District Exhibit#4) requesting to be put on the negotiations team, contract negotiations had not begun.
25. Wally Cumings is a Regional Director for NEA-NH and was involved with the original formation of the bargaining unit. He testified that at the time of formation, these employees were working in two buildings and now work in three school buildings. He testified that the three groups were combined because all three groups were providing services to students. He testified that the rights and obligations embodied in the collective bargaining agreement (CBA-Association Exhibit #3) pertained to members of all three groups with just a few differences for kitchen workers including the work year (CBA-Article 8.1) and provision for part-time employees (CBA-Article 1.2) eliminating eligibility for vacation, holiday or insurance benefits for workers employed less than 30 hours weekly.
26. Mr. Cumings testified that he learned that Ms MacDougall had a separate office from other workers, requested a copy of her job description, and determining it to be supervisory, filed an agreed Modification Petition that sought to have all Head Cooks excluded from the original bargaining unit. This modification was submitted to the PELRB as an agreed action between the Union and the District on September 10, 2001.
27. Following the original certification of the bargaining unit, an election was held at which twenty-two votes were cast. Of the thirty-one employees eligible to vote at that 1995 election, seven were kitchen staff. The vote tally sheet for that election (District Exhibit #19) indicated that twenty-two employees voted in favor of the BESS becoming the exclusive bargaining representative for the unit and seven voted against their representation.

#### DECISION AND ORDER

The authority to modify a previously certified public employee bargaining unit is vested in the Public Employee Labor Relations Board (PELRB) pursuant to RSA 273-A:8. Inherent in that authority is the discretion necessary to consider modification petitions. RSA 273-A:8. Modification Petitions present the PELRB with innumerable factual situations specific to a myriad of collective bargaining environments. This is why the PELRB has long been accorded authority to exercise discretion in modifying units to arrive at "the appropriate bargaining unit" required by RSA 273-A:8, I. Appeal of Bow School District, 134 N. H. 64, 71 (1991).

The instant petition involves a bargaining unit that was first certified by the PELRB in 1995 and modified in 2001. In both of those instances, the District and the Union agreed upon the unit composition prior to any filing with the PELRB. In such

cases, the PELRB assumes (1) that the parties have given requisite considerations to the composition of the unit. (2) the impact the proposed change on the operation of that particular governmental unit, and (3) that both parties have concluded that it constitutes a workable arrangement between a public employer and their public employees. As a consequence, unless an agreed upon petition for unit certification or modification is filed with the PELRB that presents a proposed bargaining unit, that on its face, causes the PELRB, on its own motion, to solicit additional information or conduct an evidentiary hearing, a significantly lesser degree of scrutiny is exercised before certification or modification of a bargaining unit is granted. Now, a more thorough scrutiny of this bargaining unit is required of the PELRB because the matter before it is contested and each party has participated in an evidentiary hearing, presented exhibits and witness testimony and has had the ability to cross-examine the other's witnesses. Much more information thereby becomes available to the PELRB upon which to consider the unit composition and make its determination of the appropriate bargaining unit as required by RSA 273-A:8, I.

The Union filed a Motion to Dismiss the District's Modification Petition in this matter that must first be addressed. The Union asserted in its December 4, 2001 motion that the District's Modification Petition should be dismissed because Pub 302.05 requires that result if the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force. *Ibid.* (b)(2). The evidence presented reveals that the relevant collective bargaining agreement between the parties was executed on June 10, 1999 (Association Exhibit #3,) indicating the conclusion of negotiations. There was no evidence presented at the hearing that indicated when, prior to that date, the negotiations began.

However, credible evidence was provided that indicated several circumstances had changed after those negotiations had begun. In the summer of 1999, the kitchen workers circulated and unanimously signed a petition expressing a desire to withdraw from their existing bargaining unit, the Bow Educational Support Staff/NEA-NH (BESS). (District Exhibit #1) On or about October 9, 2000, the president of the local representing the bargaining unit distributed a memorandum to all kitchen workers. (District Exhibit #2) indicating that the bargaining unit was prepared to attempt to remove the kitchen workers from the bargaining unit unless membership in the bargaining unit's union increased from among the kitchen workers. A kitchen worker at that time included in the bargaining unit sought assistance from the Union via e-mail on or about June 7, 2001 (see District Exhibit #5 as reference) to allow the kitchen workers to withdraw. A separate Modification Petition initiated by the Union, and agreed to by the District, was filed with the PELRB on September 10, 2001 excluding three kitchen workers in the position of "Head Cook" from the bargaining unit. This change was certified by the PELRB, without hearing, on September 11, 2001. These actions constitute changes sufficient to defeat the Union's Motion to Dismiss asserting that no changes had occurred since negotiations on the CBA signed in June of 1999.

In its post hearing brief the Union also raised a second reason for urging the PELRB to dismiss the District's Modification Petition, asserting that the question of unit



composition "is a matter amenable to settlement through the election process". Pub 302.05(b)(1). The Hearing Officer is not persuaded that the kitchen workers' objective to withdraw from the bargaining unit is an issue properly to be tested or controlled by an election either to oust the unit's present exclusive bargaining representative or to decertify the entire unit by electing "no representative". The District has not requested either remedy. The kitchen workers comprise a distinct employee group within a larger bargaining unit and that group is even more distinct for having exercised its rights under the PELRB rules Pub 302.05(a) to solicit the public employer to file this modification following the bargaining unit's refusal to do so. To force the remaining kitchen workers to undertake electoral actions to accomplish goals not sought by them, or the District on their behalf, is not a proper resolution of this matter. The Hearing Officer, in considering all of the evidence and pleadings in this matter, does not understand the objective of the modification petition to be the elimination of the present union representation or to have the other support staff members, namely secretaries and various educational assistants, be without representation. Indeed, there was no evidence that would indicate that the kitchen workers have any present plans to form their own bargaining unit although, should a modification be granted, they certainly could under the statute and our rules.

Having determined that the District's Modification Petition survives the dispositive dismissal efforts of the Union, the examination of its request to remove the remaining kitchen workers from the bargaining unit advances to considerations of changed circumstances sufficient to no longer support the composition of the existing bargaining unit or to considerations of whether or not the original formation of the unit was incorrect at the time it was originally formed. Pub 302.5(a)

In evaluating the merits of whether or not the existing unit is presently the appropriate bargaining unit in this case, as with all cases involving unit determinations, the PELRB does so mindful of its duty "to determine practical, appropriate and effective bargaining units." Appeal of Bow School District, 134 N. H. 64, 71 (1991) and to do so "to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging orderly and uninterrupted operation of government." Chapter 490, December 21, 1975, Statement of Policy, Revised Statutes Annotated 273-A.

The evidence presented during this hearing depicts a group of kitchen workers, sometimes referred to as food service staff, who no longer have, if they ever did have, a "self-felt community of interest" with two other major groupings of employee positions, *i.e.* school secretaries and assistants, who make up the present bargaining unit. Since the formation of this unit in 1995, there has been a unanimous petition signed by all of the kitchen workers to withdraw from the unit. And while testimony of most of the individual kitchen workers indicated that they did not clearly understand the distinction between the bargaining unit and the exclusive bargaining representative, their desire to separate themselves, as a group, from the bargaining unit was clear to the Hearing Officer from their testimony and their signed petition. (District Exhibit #1). The fact that their present testimony reiterated their earlier desires speaks only the more loudly of the lack of "self-felt community of interest" that is manifest in this case. The depth of the kitchen workers'

sentiment and its breath throughout the entire kitchen staff is a legitimate criteria to be considered in this modification proceeding. There is sufficient testimony and other evidence to indicate the existence of this lack of self-felt community of interest. The petition first circulated in 1999 and reiterated through testimony nearly three years later indicates that the history of collective negotiations between these parties has not been fully acceptable at least to the group of kitchen workers and apparently, with the District's instant petition, to the public employer as well.

According to testimony, relevant job responsibilities have remained unchanged since 1995 although not reduced to writing until 1999. An examination of the written job descriptions for the kitchen workers and the secretaries and assistants reveals several distinguishing features between the kitchen workers on the one hand and the employees within the other two classifications. District Exhibit #15 describes the position description for the school secretaries and District Exhibits #16 through #18 describe the position descriptions for the various types of educational assistants.

The kitchen worker positions are described in District Exhibits #12 through #14. Their work performance is also guided by a separate seven page Bow School District Food Service Handbook. (District Exhibit #11). A list of 14 "principal rules" included in the handbook are common to other individuals employed by the District. (District Exhibit #11, page 5) according to the testimony of Mr. Chamberlin. These rules can best be characterized as general in nature and prohibiting theft or dishonesty, acts of discrimination, falsifying time sheets, disclosure of confidential information, use of drugs, unauthorized possession of firearms, etc. *Id.* Any similar handbook covering secretaries or assistants was not in evidence at the hearing.

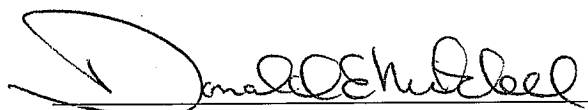
A full examination of the food service handbook and the testimony reveals that there are differences in the conditions of work experienced by kitchen workers compared to that of secretaries and assistants. Examples include a different education requirement for their hiring, a different dress code involving uniforms, different grooming requirements, different work hours and different length of workdays and a different manner of compensation, *i.e.* wages plus a stipend for kitchen workers and a wage scale with step increases for the other two groups. In addition, the kitchen workers perform their work in a restricted food handling area that subjects these workers to additional sanitation rules as well as specific rules of hygiene and work habits. The kitchen workers report through a separate "chain of command" than do the secretaries and assistants. The kitchen workers report to a business manager, Mr. Chamberlin, while secretaries and assistants do not. This appears to have been the hierarchical scheme since at least the time of the original formation of the bargaining unit. So, while all of the workers may be said to function within an organizational unit, if defined as the entire school district, the evidence reveals that the kitchen staff, in practice, organizationally operates quite apart from the secretaries and assistants. Testimony directed to the lack of interaction between the group of kitchen workers and the others, coupled with the different chain of command for each, would tend to support this latter proposition as well.

While it may be argued that every worker employed by a school district is involved in supporting the education of students, in this case, that common strand is not sufficient to bind the kitchen workers to the existing bargaining unit. In the opinion of the Hearing Officer, after examining all of the evidence, both documentary and testimonial, and giving appropriate degrees of credibility to the several witnesses presenting that testimony, finds that this unit was incorrectly formed in 1995. Indeed, the parties previously have each partially recognized this to be the case in their agreed modification to exclude the three "Head Cooks". The evidence revealed that although the job descriptions for kitchen workers and other members of the bargaining unit were reduced to writing in 1999, the duties of the kitchen workers were the same as they had been even prior to the original certification as a bargaining unit in 1995. However, when the Union reviewed the "Head Cook" job description in 2001, it found that the three employees in that position should not have been included in the original bargaining unit because of their supervisory responsibilities under RSA 273-A:8, II. Perhaps, had the composition of this matter undergone evidentiary scrutiny at the time of the initial formation of the bargaining unit, this instant Modification Petition would not have been necessary. However, the PELRB did not see cause to utilize its authority to examine the composition in detail 1995. It has been the practice of the PELRB, for the most part, to accede to such "agreed" bargaining units and not require supportive mutual statements of fact or basic offers of proof before certifying an initial agreed upon bargaining unit.

Consequently the kitchen workers/food service workers are to be excluded from the existing bargaining unit. They are hereafter free to exercise their rights under RSA 273-A:10 to form a separate bargaining unit or not as they are, among themselves, of sufficient number to do so. The District shall continue to negotiate with the present exclusive bargaining representative for the reformed bargaining unit now comprised of secretaries and assistants, formerly referred to in the original unit certification as "aides". By continuing in negotiations, it is not anticipated that this reformation will either interrupt the orderly efficient operation of the Bow School District or serve to divide the loyalties of any group, be it BESS in its reformed composition or the kitchen workers independently or after becoming a separately certified bargaining unit.

So Ordered.

Signed this 11<sup>th</sup> day of March, 2002



Donald E. Mitchell, Esq.  
Hearing Officer