

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Derry Education Association, NEA-NH

Petitioner

v.

Derry School District, SAU #10

Respondent

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Case No. T-0223-22

Decision No. 2003-021

APPEARANCES

Representing the Derry School District:

Michael S. Elwell, Esq.

Representing the Derry Education Association, NEA-NH:

James F. Allmendinger, Esq., Staff Attorney for NEA-NH

BACKGROUND

The Derry Education Association, NEA-NH ("Association") filed a Modification Petition on December 2, 2002 that sought to increase the composition of its existing bargaining unit to include the positions of occupational therapist, physical therapist, speech language therapist, certified occupational therapy assistant and physical therapist assistant. The Association also sought to change the descriptive language of the unit's certification order by substituting the words "All Professional Employees" for the references to specific job positions that appear on that document.

The District filed its objection with the PELRB on December 17, 2002. It did not object to the inclusion of the positions of occupational therapist (OT), physical therapist (PT), or speech language therapist into the bargaining unit. It did object to the inclusion of the positions of certified occupational therapy assistant (COTA) and physical therapist assistant (PTA). Further, it objected to the substitution of "All Professional Employees" phrase that was proposed by the Association.

A final hearing was initially scheduled by the PELRB for January 14, 2003 but was rescheduled, at the request of the parties, to be conducted February 6, 2003. On that date the final hearing was conducted before the Hearing Officer at the offices of the Public Employee Labor Relations Board in Concord, New Hampshire. Both parties were present at the hearing with their counsel, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the outset of the hearing, the parties stipulated that the positions of occupational therapist, physical therapist and speech language pathologist could be included in the bargaining unit by mutual consent. At the close of the hearing, the record was held open to allow submission of replacement pages to Association Exhibit #6 portions of which became illegible during their duplication, to allow submission of a list of positions and hourly wage rates by the District (later marked as Association Exhibit #10) at the request of the Hearing Officer and to allow submission of memoranda of law.

FINDINGS OF FACT

1. The Derry School District (hereinafter referred to as the "District") employs educational staff and other personnel in the operation of its school system and in its provision of educational services within the District and therefore is a public employer within the meaning of RSA 273-A:1 X.
2. The Derry Education Association is an association of employees affiliated with the National Education Association – New Hampshire (hereinafter referred to as the "Association") that is the duly certified exclusive bargaining representative for the positions of professional employees, guidance counselors, speech therapists, librarians and school nurses. The unit specifically does not include the Superintendent, Assistant Superintendents, Principals, full-time Assistant Principals, Directors, and all nonprofessional employees. This composition was duly certified by the PELRB on June 17, 1977.
3. The parties stipulated that the positions of occupational therapist, physical therapist and speech language pathologist would be included in the Association's bargaining unit.
4. On or about June 8, 2000 individuals in the position of Certified Occupational Therapy Assistant (COTA) made a request of the District's administration that the District allow the COTA's to join the Derry Education Association

bargaining unit. (Association Exhibit #2). The, then, District Superintendent did not respond to the written request nor initiate a modification petition to include them in the Association on their behalf at that time. At some later unspecified time, the Superintendent suggested to the COTA's that they should be part of a different unit, the Derry Education Assistant's Association. The District did not initiate a modification petition to achieve the COTA's inclusion in that unit either.

5. Following negotiations prior to September 7, 2001 the District and the Association became parties to a Collective Bargaining Agreement (CBA) effective July 1, 2001 to June 30, 2004 (District Exhibit #1).
6. Following negotiations prior to May 17, 2002 the District also became a party to a separate Collective Bargaining Agreement (CBA) with the Derry Education Assistants, AFSCME Council No. 93, Local 1801 effective July 1, 2002 to June 30, 2005 (District Exhibit #3).
7. Ms. Nancy Duggan, a COTA within the District and author of the request referred to in Finding #7, approached the certified exclusive bargaining representative, AFSCME Council No. 93, Local 1801, for, the Derry Education Assistants Association, and requested to be included in that bargaining unit in 2001 as suggested previously to her by the, then, Superintendent. At that time, AFSCME was entering into negotiations with the District for a new collective bargaining agreement (CBA) for the Derry Education Assistants' Association. The issue of inclusion of the COTA's and PTA's was not negotiated at that time by that group or the District. That unit's CBA covered the period 2002-2005 and was signed without a change in the recognition clause to include the COTA's and PTA's. (District Exhibit #3).
8. The management team comprised of the District's Superintendent, Assistant Superintendent and Business Administrator, who suggested COTA's and PTA's not seek representation by the Association have all left employment with the District and a new Superintendent was hired in July 2002.
9. Since the time of the COTA's first request of the District to be included in the Association in 2000, the District has negotiated and executed collective bargaining agreements with both the Derry Education Assistant's unit and the Derry Education Association unit.
10. No party initiated a unit modification petition with the PELRB for the inclusion of these positions in any existing unit prior to the action presently before the PELRB.
11. The parties presently before the PELRB, the District and the Derry Education Association – NEA-NH, concluded negotiations for their existing collective

bargaining agreement in September 2001 without any attempt to negotiate the inclusion of the COTA and PTA positions into the Association bargaining unit.

12. The instant modification petition brought on behalf of the COTA's and PTA's was filed with the PELRB on December 2, 2002.
13. This CBA and earlier CBA's negotiated between these two party's included representation of members possessing diverse specialized skills and various degrees of higher learning.
14. The COTA's and PTA's perform their work within the District's schools in which the members of the existing Derry Education Association bargaining unit perform their work. They perform as part of a special education component within the District's administration directed by Christopher Kellan, the Director of Special Services. The COTA's and PTA's provide therapy in their respective disciplines to students within the district that have been identified as having special needs. The work performed by the COTA's and PTA's is incorporated into those students' educational experience within the school system.
15. The individuals employed as COTA's and PTA's participate in group meetings with other members of the Association regarding the program and overall performance of students requiring special services.
16. The positions of COTA and PTA share most of the working conditions existing in the facilities of Pinkerton Academy and the seven lower schools within the District as those positions presently included in the bargaining unit.
17. They interact daily with other members of the bargaining unit. They work with these other individuals in a team approach method to assist their students. They are treated as peers at group meetings at which information and discussion of student needs arise. At these group meetings, COTA's at times substitute for OT's and PTA's at times substitute for the attendance of PT's.
18. The COTA's and PTA's receive similar, though not always identical, levels of many benefits provided by the District to existing unit members such as: health insurance, dental insurance, life insurance, bereavement leave, personal days, perfect attendance bonus, and holidays with pay. (See District Exhibits # 1, #3, #4, #5, #6).
19. The COTA's and PTA's perform as part of a team of specialists employed by the District, including a student's classroom teacher, guidance counselor, school psychologist, special education teacher, and also speech language pathologist, occupational therapist and physical therapist depending on the

nature of each student's need. All of these individuals are in licensed occupations or are certified by a state agency.

20. The positions of occupational therapist (OT), physical therapist (PT), occupational therapy assistant (COTA), and physical therapist assistant (PTA) are all licensed by the State of New Hampshire Office of Allied Health Professionals. The OT's and the COTA's are certified by the same national body, the National Board for Certification in Occupational Therapy, Inc. (See Association Exhibit #1).
21. OT's, PT's, COTA's and PTA's all complete an advanced level of specialized instruction that include post high school formal courses of study leading to, in the case of the OT's and PT's, a Baccalaureate degree and in the case of the COTA's and the PTA's an Associate degree. Both the therapist and assistant categories complete internships and field requirements, although of varying lengths, and completion of a national examination.
22. Both Ms. Duggan and Ms. Nowak provided credible testimony as to the self-felt community of interest COTA's and PTA's held with regard to those positions presently represented by the Association.
23. Ms. Nanci Duggan (COTA), Ms. Cheryl Nowak (PTA) and Ms. Cathie Partridge-White (Speech Pathologist) all variously described their working style and relationship with existing unit members, now including OT's and PT's as "collegial", working as a "team", being recognized and treated as a "peer". Mr. Chris Kellan, Director of Special Services, testified that in the joint meetings, each participant has "an equal say as to a child's program".
24. The COTA's and PTA's, speech language pathologists and OT's execute employment contracts annually with the District. At the present time the PT position is contracted to an outside service. According to the testimony of Dr. John Moody, Superintendent of Schools since July 2002, while teachers and OT's are provided individual employment contracts annually as well, (See District Exhibits #7 and #8) their contracts require "just cause" for termination after three years pursuant to RSA 189:13 where the individual contracts of the COTA's and PTA's do not have such a provision linked to that statute.
25. Barring existence of an interim reason for termination, the contracts of the COTA's and PTA's anticipate employment for the school year (Association Exhibit #9; District Exhibits #5 and #6).
26. The annual individual contracts used for the OT's are the same as are those individual contracts issued to "teachers".

27. The individuals employed as COTA's and PTA's spend approximately 90% of their time providing services directly to the student. OT's and PT's spend approximately 75% of their time doing the same.
28. The minimum educational degree requirement for COTA's and PTA's is an Associate's degree. The minimal degree requirement for other positions within the existing unit varies.
29. The minimum degree requirement for an Occupational Therapist or Physical Therapist is a Baccalaureate degree and the minimum degree requirement for an Occupational Therapy Assistant or a Physical Therapist Assistant is an Associate's degree.
30. The individuals employed as COTA's and PTA's must possess a minimum of an Associate's degree, complete a supervised internship, complete a national written examination and obtain a certificate from a state agency before they are eligible for employment in their respective positions. They are certified by the NH Board of Allied Health Professions. This same licensing authority certifies occupational therapists and physical therapists.
31. OT or OTA curricula are both accredited by the Accreditation Council for Occupational Therapy Education. (District Exhibits #9 and #10).
32. The minimum degree requirement for nurses within the District who are included in the Association's bargaining unit is an Associate's degree. Four of the seven nurses presently employed by the District possess a Baccalaureate degree.
33. Many of the functions of the COTA are similar, if not identical to those of an OT as described in Association Exhibit #2 except that the OT is the only one licensed to conduct a student's "evaluation" and set the student's program goals and objectives. To do so, they frequently have discussions with the COTA and often are dependent upon the initial and continuing "assessments" of the student made by COTA's to complete their own reports.
34. Only PT's are licensed to compose the physical treatment plan for the student and that is done, in most instances, in consultation with or after an assessment report by PTA's.
35. Testimony of Ms. Nanci Duggan, a COTA employed on a full time basis by the District, and Cheryl Nowak, a PTA employed on a part time basis by the District was uncontroverted that the District had established no written job descriptions for either position, conducted no periodic evaluations of individuals employed in these positions and maintained no evaluation forms for use in measuring the performance of those employed in these positions.

Their testimony in this regard was corroborated by Christopher Kellan, Director of Special Education for the District.

36. The COTA's and PTA's are subject to the same administrative hierarchy as are other members of the bargaining unit within the District. Also, Ms. Duggan and Ms. Nowak's testimony regarding the lack of participation of either an OT or a PT in their hiring, their requests for time off, their scheduling or notification of their need for sick leave was uncontroverted.
37. Mr. Kellan stated that he would defer to an OT or PT if he were ever was to evaluate a COTA's or PTA's performance of therapy. He did not use OT's or PT's when hiring COTA's or PTA's.
38. Both Ms. Duggan and Ms. Nowak testified as to the non-participation of an OT in the case of Ms. Duggan's hiring or a PT in the case of Ms. Nowak's hiring and both testified that they consider Mr. Kellan as their supervisor.
39. There are presently two occupational therapists employed in the District and one physical therapist position that is filled by an outside contractor.
40. The supervisory authority maintained by those employed within the OT and PT position consists of determining which functional goals are set for a student, and establishing what therapeutic program is to be applied within professional standards and norms and in concert with input from assessments performed by the assistants. Otherwise their work is mostly "hands-on" therapy not unlike that performed by COTA's and PTA's in accordance with established therapy practices.
41. New Hampshire Administrative Rules Med 703 regulates, *inter alia*, the supervisory relationship between an occupational therapist and an occupational therapy assistant regarding supervision of the latter's therapeutic care activities.
42. New Hampshire Administrative Rules Med 806 regulates, *inter alia*, the supervisory relationship between a physical therapist and a physical therapist assistant regarding supervision of the latter's therapeutic care activities.

DECISION AND ORDER

The Public Employee Labor Relations Board (PELRB) is the administrative agency charged with the determination of the composition of public employee collective bargaining units. RSA-A:8. The composition of each bargaining unit is evaluated on its own circumstances on a case by case basis. Appeal of Town of Newport, 140 N. .H. 343, 352 (1995).

FINDING

The circumstances that existed at the time this action was filed have sufficiently changed from those that existed prior to the execution of the parties' existing collective bargaining agreement to allow PELRB consideration of the merits of the petition. After considering all of the parties' filings, exhibits and testimonial evidence and weighing the credibility of each witness, the Hearing Officer denies the request of the petitioner to modify the bargaining unit certificate to define the unit composition as "All Professional Employees". The Hearing Officer does find that a sufficient community of interest exists between the positions of certified occupational therapy assistant (COTA) and physical therapist assistant (PTA) and the other members of the bargaining unit, following the stipulation by the parties to include the positions of occupational therapist, physical therapist and speech language pathologist. Further, the Hearing Officer finds that the positions of occupational therapy assistant and physical therapist assistant meet the statutory standard of "professional employee" in the governing statute, RSA 273-A:1, VIII. In addition, the Hearing Officer finds that the supervision received by COTA's and PTA's from occupational and physical therapists, respectively, is provided in conformity with professional standards of care and service. This type of supervision does not cause the positions of COTA and PTA to be excluded from the same bargaining unit by operation of the so-called "supervisory exclusion" referenced in RSA-A:8, II. As a result of these findings, the bargaining unit shall be modified to include the positions of occupational therapist, physical therapist, speech language pathologist, occupational therapy assistant and physical therapist assistant. The Association's request for a single general reference of "All Professional Employees" to replace the existing description of the unit is denied.

DISCUSSION

The first issue presented by the facts and raised by the District in its answer to the Association's Modification Petition is whether or not this petition should be denied under the provisions of the Public Employee Labor Relations Board's (PELRB) administrative rule Pub. 302.05(b)(2). In relevant part, this rule provides that "circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force." Part of the rationale supporting this provision is to prohibit a bargaining unit from defeating an original PELRB certification order. A second reason is to prohibit a party from unsuccessfully negotiating a change through the collective bargaining process and then attempting to achieve the same result outside of the negotiation process by then filing modification petitions before the PELRB. In this action, the parties concluded negotiations of their existing agreement on or about September 7, 2001. After that time, individuals in the position of COTA and PTA approached the exclusive representative of another bargaining unit within the District for representation at the previous suggestion of the, then, Superintendent of Schools who was aware of their desire to be represented. Negotiations were conducted between the District and the other bargaining unit with neither side negotiating for the inclusion of the COTA's and PTA's. Those negotiations concluded on or about May 17, 2002.

Subsequent to the conclusion of those negotiations and prior to the present action, neither the District nor the other bargaining representative filed a modification petition with the PELRB. The result of the non-bargaining for inclusion of these positions and the absence of any petition to the PELRB left the COTA's and PTA's without representation at the time both CBA's were executed. Consequently, neither representation nor good faith attempts at gaining representation had occurred prior to the parties' negotiations on the collective bargaining agreement presently in force. Therefore the modification petition survives to be considered on its merits.

The positions of occupational therapist, physical therapist and speech language pathologist are to be included in the Association's bargaining unit pursuant to the parties' stipulation. The remaining positions for consideration of inclusion are "occupational therapy assistant" and "physical therapist assistant." The PELRB's threshold consideration is whether a "community of interest" exists among a certain group of job positions. Unit composition cases are heavily fact dependent. 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 statutory criteria expressed in RSA 273-A:8, I that may be used to determine the existence of a community of interest include an examination of the conditions of employment, the history of workable and acceptable collective negotiations, involvement in the same historic craft or profession and whether the subject positions function within the same organizational unit. The PELRB has promulgated additional considerations as part of its administrative rules. (See Pub 302.02.) These include the existence of a common geographic location for the proposed unit, common work rules and personnel practices, a common salary structure and fringe benefit structures, and whether or not there is a self-felt community of interest among those to be included in the unit. These are not exclusive criteria, nor must they all apply in every circumstance. They are promulgated to give notice to the parties of the nature of the working relationship that is being evaluated. The PELRB does not apply a mechanical rule in making its determination. Its duty is to determine practical, appropriate and effective bargaining units. Appeal of Bow School District, 134 N. H. 64, 71. The ultimate question is whether there is a sufficient community of interest among the bargaining unit positions so that it is reasonable for those included to negotiate together. *Id.* Citing Appeal of the University System of New Hampshire, 120 N. H. 853, 855 (1980).

The COTA's and PTA's work in the same school buildings and experience the same conditions that exist in these facilities as do members of the existing unit. They interact daily with members of the existing unit in these places. They perform their work as part of a team of specialists who work collegially to identify, assess, and evaluate, students with special needs and to develop and implement joint programs of instruction and therapy to provide an education for such students. They are part of the department within the school system responsible for special needs students. This Department of Special Services coordinates the work of occupational therapists, physical therapists, special education teachers, guidance counselors, and psychologists who are members of

the existing bargaining unit, as their own work applies to special needs students. Full time COTA's and PTA's receive many of the types of benefits provided to members of the existing unit, although not always of the same amount. These include participation in an employer sponsored health insurance program, dental insurance program, paid life insurance, bereavement leave and personal days, sick leave and the ability to accumulate that leave. They are eligible for a perfect attendance bonus, they receive bi-weekly wage payments during the school year, and they are paid for the same holidays that occur during the school year as members of the bargaining unit. Those employed less than full time receive less compensation than full time employees in benefit packages.

COTA's and PTA's perform their services over the course of virtually the same work year, *i.e.* school year, and during virtually the same workday as those employees already in the bargaining unit. They participate as peers with members of the existing unit in after school meetings and are recognized for an equal say in the discussion of a student's program. Ninety percent of the time they are working they are providing direct services to students as do most existing members of the unit. Their positions require completion of advanced formal programs of specialized study as evidenced by possession of an associate's degree as well as a certificate or license. They execute annual individual contracts with the District anticipated to be effective during the ensuing school year. Barring the occurrence of an intervening termination, the individual employment contracts of the COTA's and PTA's are effective for the school year. Many members of the existing unit who have three years of service are covered by RSA 189:13 that requires "just cause" for termination. However, existing unit members with less than three years of service, like all COTA's or PTA's, may be terminated without "just cause".

They are involved in the same specialized service as OT's and PT's and, in the context of today's comprehensive educational mission, share responsibilities with them as well as with others within the bargaining unit that represent the diverse disciplines brought to bear on the education of students in general and special needs students in particular. COTA's and PTA's, like OT's and PT's are certified or licensed by the New Hampshire's Office of Allied Health Professionals. Credible testimony was offered by Ms. Duggan (COTA) and Ms. Nowak (PTA) that each them possessed a strong self-felt community of interest with the position of OT and PT, that are acknowledged by the parties as having a sufficient community of interest to be added to the bargaining unit, and with other members in positions previously assigned to the bargaining unit. Finally, the existing bargaining unit has negotiated several collective bargaining agreements that cover members possessing various levels of degrees obtained after graduation from high school. All of these characteristics lead the Hearing Officer to conclude that the positions of COTA and PTA share a community of interest with members of the bargaining unit.

Having found that a community of interest exists, the District's request that the COTA and PTA positions be excluded from the existing bargaining unit on the basis that they are not "professional employees". A "professional employee" is defined as "any employee engaged in work predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment, and requiring knowledge in a discipline customarily acquired in a formal program of advanced study." RSA 273-A:1,

VIII. Individuals employed in these positions continue their education beyond high school in an advanced level of specialized instruction that involves fieldwork and classroom study and culminates in the award of an associate's degree. Further, in the case of the COTA successful completion of a national written examination is necessary to become certified. Both positions are licensed occupations requiring the application of a specialized, not general, education in the performance of their services. (See RSA 326-C-Occupational Therapists and RSA 328-A - Physical Therapists); see also Assôciation Exhibit #2). Credible testimony indicated that COTA's and PTA's continually utilized their education and training to perform "hands-on" services to the many students that comprised their caseloads. They are required to assess students' progress in pursuit of therapeutic goals and objectives. The governing statute does not focus on nor establish a particular degree level as being required to be a "professional employee" for purposes of the rights afforded under RSA 273-A. It is difficult to find that the work of occupational therapy assistants and physical therapist assistants, whose many students by classification require special services, do not perform work that otherwise meets the standard embodied in the statute as that of a "professional employee". Therefore, no separate election proceeding would be necessary if the subject positions were to be added to the existing bargaining unit.

The last basis for exclusion of these two positions that is raised by the District calls for an analysis of the supervisory relationship that may exist between the COTA's and PTA's and the OT and PT positions previously stipulated for inclusion by the two parties. This analysis is required by RSA 273-A:8, II which provides that members within the existing unit that exercise "supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." RSA 273-A:8, II.

In the first instance, it is the PELRB that is vested with the discretion to delineate which employees are "supervisory" Appeal of City of Concord (1983) 123 N.H. 256. When the PELRB is asked to examine exclusions based upon a supervisory relationship, it looks for guidance to a standard expressed by the court, *inter alia*, which provides that "A supervisory relationship exists when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." Appeal of East Derry Fire Precinct, 137 N.H. 607, 610 (1993). There are many factors that are considered in determining whether a job position warrants exclusion based upon its supervisory status. Several that have been specifically mentioned include the authority to evaluate other employees, the employee's supervisory role, and the employee's authority to discipline. Appeal of the Town of Stratham, 144 N.H. (1999), citing Appeal of East Derry Fire Precinct 137 N.H. 607, 611. (1993). Neither the PELRB nor the Court has ignored nor abandoned the underlying purpose served by the distinction being made, which is the avoidance of "conflicts between the two groups because of the differing duties and relationships which characterize each group," *Id.*, citing Appeal of Manchester Bd. of School Comm., (1987) 129 N.H. 151,153.

The inclusion of the COTA's and PTA's involves persons employed in the performance of occupational and physical therapy services within the Derry School District and does not present the circumstances at issue in either of the firefighter/fire officer cases, Appeal of University System of N.H., 131 N.H. 368 (1988) or Appeal of E. Derry Fire Precinct, 137 N.H. 607 (1993). In those cases a strict hierarchy of supervision and job duties was present. Here, the organization does not function in a similar hierarchical manner. COTA's and PTA's report to school principals and the Director of Special Services regarding incidents not related to therapy such as time off, scheduling and reports of sick leave. They also report information regarding their contribution to a student's program to other professionals working in the groups of educators and others who have coalesced to serve a student's needs. They provide written assessments, treatment recommendations and other information to OT's and PT's, respectively.

There are no employee evaluation forms in existence and there is no employee evaluation process in place for COTA's or PTA's. In Appeal of University System of N. H., 131 N.H. 368 (1988) those cast in supervisory roles participated in evaluations where their evaluation was given weight in granting merit pay increases and in terminating new employees. Supervisory duties included assigning work, ensuring shifts were fully staffed and taking command at the scene of a fire. Likewise in the Appeal of E. Derry Fire Precinct case, the evaluations undertaken by those fire officers affected hiring and terminating firefighters and included the authority to send unfit firefighters home. The evidence presented in the instant case involves employees who treat the occupational and physical therapy needs of students and the evidence does not disclose a genuine vesting of discretionary authority in OT's, PT's, or other members of the bargaining unit to hire or terminate a COTA or PTA or to exercise the discretion to grant an increase in wages, or to assign these employees to shifts or schedules. With respect to exercising discipline over others, in the firefighter cases cited above, the exercise of disciplinary authority included assessment of fitness for duty and issuance of warnings and even extended to sending personnel home if deemed unfit by them. In this instant case, the environment and operating style existing within the school system appears to have created a workplace characterized by a diffusion of authority. No evidence was offered of any discipline having been recommended or imposed by an OT or PT in the years since the positions were created. There was no evidence presented that OT's or PT's had the authority to discipline COTA's or PTA's. The only relevant reasonable inference that could be taken from Mr. Kellan's testimony is that he would defer to the OT's and PT's if improper therapy or violations of other professional standards were being undertaken by a COTA or PTA. However, it was clear from Ms. Duggan's and Ms. Nowak's testimony that that they considered Mr. Kellan their supervisor. It was equally clear from Mr. Kellan's testimony regarding the supervisory authority being exercised by the OT's and PT that it was clinical supervision that was being exercised over the COTA's and PTA's. A fair reading of the administrative rules pertaining to OT's (District Exhibit #12) and PT's (District Exhibit #13) also use supervisory references that relate to actions in conformity with the professional standards attendant with the provision of therapeutic care. Indicia of this type does not genuinely vest either the OT or the PT with the type of authority that "may be exerted or withheld depending on his or her discretion" as embodied in the statute. RSA 273-A:8, II. This is not uncommon as the court has previously recognized

by saying that "some employees performing supervisory functions in accordance with professional norms will not be vested with the requisite degree of discretion in the exercise of authority. Appeal of E. Derry Fire Precinct, 137 N.H. 607, 611 (1993); also cited in the Appeal of Town of Newport, 140 N.H. 343 (1995). Crucial to the court's finding of the requisite significant supervision exclusion of certain supervisory positions in this latter case was their authority to recommend hiring, retention, and dismissal of employees, to approve leave requests, and to be responsible for disciplinary action. This combination of discretionary ingredients is not presented by facts of the instant case.

Therefore, after having considered all of the pleadings and documentary evidence, the content and the credibility of the witnesses' testimony and the applicable law, the Hearing Officer finds that there is no impairment to modifying the existing bargaining unit to include the position of occupational therapy assistant (COTA) and physical therapist assistant (PTA). Therefore, these position titles shall be added to the existing certificate of representation for this bargaining unit.

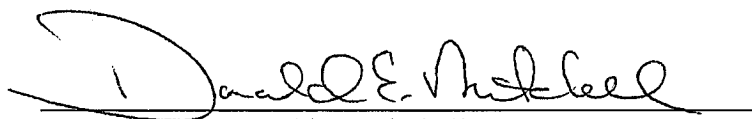
Lastly, The Hearing Officer addresses the Association's request for the adoption of the phrase "All Professional Employees" as the sole description of the unit's composition. When two parties cannot agree to a consensual unit composition, the PELRB conducts original unit composition or modification hearings. It makes determinations as to the inclusion or exclusion of individual positions on a case by case, position by position basis. It will continue to make its rulings in that incremental manner and issue its decisions and orders regarding individual positions and not the broad general category suggested in this case. The Association's request for a single general reference of "All Professional Employees" to replace the existing description of the unit, as now modified, is denied.

ORDER

The bargaining unit shall now include: teachers, guidance counselors, speech therapists, librarians, school nurses, occupational therapists, physical therapists, speech language pathologist, occupational therapy assistant and physical therapist assistant.

So ordered.

Signed this 19th day of March, 2003



Donald E. Mitchell, Esq.
Hearing Officer