



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Lebanon Support Staff Association, NEA-New Hampshire	*	
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Petitioner	*	
	*	Case No: M-0585-9
v.	*	
	*	Decision No. 2004-005
Lebanon School District	*	
	*	
	*	
Respondent	*	
	*	

APPEARANCES

Representing the Lebanon Support Staff Association, NEA-NH:

Brian Sullivan, NEA-NH UniServ Director

Representing the Lebanon School District:

Michael S. Elwell, Esq.

Also Appearing as Witnesses:

Paula Dutille, Paraeducator and President, Lebanon Support Staff Association
 Nancy Chiasson, Special Education Programmer
 Dr. Michael Harris, Superintendent of Schools, Lebanon School District
 Kelly Gage, Recreation Therapist

BACKGROUND

The Lebanon Support Staff/NEA-New Hampshire (hereinafter "the Association") filed a Modification Petition with the Public Employee Labor Relations Board (PELRB) on September 26, 2003 seeking to add the position of recreation educator/recreation director¹ to the existing

¹ The parties' pleadings and exhibits refer to the instant position in various ways, including "playground monitor," "recreation educator," "recreation director," "recreational therapist," "therapeutic recreation specialist" and

certified bargaining unit. In its petition, the Association alleged that the position engages in the same or similar work activities as other members of the bargaining unit represented by the Association and otherwise shares a community of interest with members of the bargaining unit.

The Lebanon School District (hereinafter "the District") filed its Answer and Exceptions to the Association's petition on October 13, 2003, raising several grounds upon which it claims that the petition should be dismissed. First of all, the District asserts that the position existed before the parties negotiated their current collective bargaining agreement ("CBA"), that the Association agreed with the District at that time not to include the position in the bargaining unit, and that the circumstances surrounding the formation of the existing bargaining unit have not changed since the negotiation of the current CBA. The District also claims, among other things, that the position does not have a community of interest with other members of the bargaining unit, that its inclusion in the bargaining unit would adversely effect the efficiency of government operations, and that based upon its status as a professional position it may not be added to the existing bargaining unit unless the incumbent to the position and members of the current unit vote independently to be placed in the same bargaining unit. On October 23, 2003, the District filed a "Consented-to Motion to Amend Answer and Exceptions to Unit Modification Petition." In its amended answer, the District raised an additional objection to the Association's petition based upon the argument that the position is a "supervisor" and may not be included in the same bargaining unit with employees over whom supervisory authority is exercised.

A hearing on the merits of the Association's petition was conducted on October 27, 2003 before the undersigned Hearings Officer at the offices of the Public Employee Labor Relations Board in Concord, New Hampshire. Both parties were present at the hearing with their representatives, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the commencement of the hearing, the District's "consented-to" motion to amend its answer was granted. At the conclusion of the hearing, the record was closed subject to the filing of post-hearing briefs, both of which were filed in a timely manner with the PELRB on November 17, 2003.

FINDINGS OF FACT

1. The Lebanon School District employs persons that provide educational support services, including, but not limited to, custodial, maintenance and para-educator employees within its public schools and therefore constitutes a public employer within the meaning of RSA 273-A:1, X.
2. The Lebanon Support Staff Association/NEA-NH is the duly certified exclusive bargaining representative of a bargaining unit comprised of certain employees employed by the District that perform custodial, maintenance and para-educator functions.
3. The District and the Association are parties to a collective bargaining agreement (CBA), for the period July 1, 2002 – June 30, 2004, wherein the District recognizes

"recreation therapist." Since there is only one position in dispute, and in the interests of clarity and uniformity, it will hereinafter simply be referred to as "the position."

the Association "as the exclusive representative of regular employees appointed as custodial, maintenance and para-educators." (Joint Exhibit No. 1, p. 2).

4. Paula Dutille has been employed by the District for 24 years, currently holding a position of para-educator. She is also President of the Association and meets on a regular basis in such capacity with Dr. Michael Harris, the District's Superintendent of Schools.
5. Ms. Dutille testified that she met with Dr. Harris in his office just before the start of the new school year in 2001. She recalled that during this meeting, Dr. Harris informed her that due to concerns over unsafe playground activity, the District was planning to hire an additional person to supervise the playground. Dr. Harris spoke to her regarding the position's salary range, indicating that it was higher than that of the Association's bargaining unit. She also understood from him that it was not a teacher's position. She testified that while the job could be a support staff position, she did not believe that it was at that time. She indicated to the Superintendent the Association's agreement that the position would not be included in the bargaining unit represented by the Association.
6. Ms. Dutille testified that based upon her conversation with the Superintendent, it was her "feeling" that the position was "temporary." She stated that she thought it was temporary because the playground problem was related to the sixth grade and once those students left the school for the seventh grade, the need for the position would end. On cross-examination, however, Ms. Dutille acknowledged that the Superintendent did not tell her that the position was temporary. Ms. Dutille also testified that Nancy Chaisson, the Association's Building Representative at the Hanover Street School, had informed her that a grant had been received to cover the wages for the position, although she later learned that this was untrue. It was her belief at the time that it would be a one-year grant.
7. On or about August 27, 2001, the District hired Kelley Gage for the position at the Hanover Street School.
8. Nancy Chaisson has been employed by the District for sixteen (16) years, currently holding a position of special education programmer at the Hanover Street School. She also serves as the Association's Building Representative at the Hanover Street School. She testified that during the course of her daily work she has had the opportunity to observe the duties being performed by Ms. Gage.
9. Ms. Chaisson testified that Ms. Gage's primary role is monitoring the playground, noting that there are seven (7) regular recesses at Hanover Street School. Ms. Gage also does some work in classrooms, including one on one contact with students, such as reading. Ms. Chaisson described Ms. Gage's non-playground duties as being the same or very similar to those of other para-educators. She also testified that para-educators have monitored recess at the Hanover Street School for as long as she has worked at the school.

10. Ms. Chaisson also stated during her testimony that around the time of the hiring of the position, para-educator staff members came to her with concerns regarding the position. Thereafter, she went to speak with Dr. Jeff Spiegel, Principal of Hanover Street School. Ms. Chaisson testified that Principal Spiegel explained to her that he had written a grant to fund this position due to the fact that it may possibly be temporary in nature.
11. Kelley Gage testified that the District hired her for the position in August 2001. She stated that she has never been asked to join the Association and does not want to join. In a memorandum dated October 20, 2003 to the Director of the PELRB, Kelley Gage wrote: "This is my third year at Hanover Street School in the position of Recreational Therapist. I have never been, nor do I choose to be, a member of the Lebanon Support Staff Bargaining unit..." (District Exhibit No. 1).
12. Ms. Gage testified that she believes it would be a conflict of interest for her to be included in the bargaining unit given the fact that she supervises two individuals who are presently in the bargaining unit. She has conducted performance evaluations of two bargaining unit members. (District Exhibit Nos. 3 and 4). She also testified that a bachelor's degree is required for her position, as well as certification as a therapeutic recreation specialist, and indicated that these job requirements distinguish her position from those currently contained in the support staff bargaining unit.
13. A job description for "Hanover Street School Recreation Educator" was prepared on or about July 18, 2001 and established as qualifications for the position the possession of a college degree in education or related field, as well as certification as Therapeutic Recreation Specialist. (District Exhibit No. 6). In late spring 2003, Ms. Gage wrote an amended job description for the position entitled "Hanover Street School Recreational Therapist." (District Exhibit No. 2). The new job description included additional qualifications (i.e., certification in "Crisis Prevention Intervention") and responsibilities (i.e., "[f]acilitate social skill group activities in collaboration with classroom teachers...", and "[p]rovide assistance to Crisis Intervention Team.") (District Exhibit No. 2).
14. Although there are members of the Association's bargaining unit that hold college degrees and certifications in specialized fields, these qualifications are not required as a condition of employment.
15. Ms. Gage's wages and benefits are set forth in an employment contract entered into between her and the District for the 2003-2004 school year. In accordance therewith, she is paid at a rate of \$16.40 per hour and \$20,893.60 per year. She also receives a \$3,500 stipend to use toward a benefit package, and is allowed five personal and nine sick days during the length of the contract. (District Exhibit No. 7).
16. In accordance with Article 13 of the parties' CBA, the maximum starting salary for paraeducators in the 2002-03 school year was \$9.30 per hour. The parties agreed to a

3.0% pay increase for paraeducators for the second year of the contract (2003-04). (Joint Exhibit No. 1, p. 8).

17. Ms. Gage is listed under the heading of "Support Staff" in the 2003-2004 school year student and staff handbook for Hanover Street School. (Association Exhibit No. 5).
18. Dr. Michael Harris testified that he has served as Superintendent of Schools for the District (S.A.U. #88) since the summer of 1999. Over the course of his first two years with the District, he received complaints by parents and the principal regarding the monitoring of recess at the Hanover Street School. In consultation with Principal Spiegel, the decision was made in the summer of 2001 to create the position in order to address the safety concerns that had been raised.
19. Dr. Harris also testified that in August of 2001 he had a discussion with Ms. Dutille, Association President, about whether the position would be included in the bargaining unit. He stated that Ms. Dutille agreed that it was not an appropriate position for the bargaining unit represented by the Association.
20. Dr. Harris testified that during the fall of 2001, the Association and the District negotiated a successor collective bargaining agreement, to be effective July 1, 2002. At no time during said negotiations did the parties bargain over the position and/or its working conditions.
21. On cross-examination, Dr. Harris testified that as between the teacher's bargaining unit and the support staff bargaining unit, it would be more appropriate for the recreation therapist to be included with the support staff. On redirect examination, however, he reiterated his belief that it would still be inappropriate for the position to be included in the support staff bargaining unit.
22. Ms. Dutille testified that in the spring of 2003 an issue came up again regarding the position. Specifically, members of the Association had become upset that the person in the position was being paid a higher salary than other para-educators and was performing bargaining unit work.
23. Representatives of the Association, including Ms. Dutille and UniServ Director Brian Sullivan, met with Dr. Harris on May 16, 2003 regarding the matter. There was no agreement to include the position in the bargaining unit at that time. Dr. Harris testified that he left the meeting with the impression that the issue would be raised during negotiations for a successor contract during the fall of 2003.
24. By letter dated May 28, 2003, Mr. Sullivan made a formal request to the Superintendent, on behalf of the Association, that the District agree to include the position in the Association's bargaining unit. In the letter, Sullivan referenced the discussion that had taken place on May 16, 2003, stating his belief "that it was agreed that since this position does not require a professional certification, it is more appropriately placed in the support staff unit rather than the teacher bargaining unit."

Sullivan also indicated in his letter to the Superintendent that "the type of work done in this position is appropriate for the [Association's] bargaining unit." (Association Exhibit No. 1, p. 1).

25. By letter dated June 17, 2003, District counsel Michael Elwell responded on behalf of the Superintendent, writing that the District is unwilling to consent to a modification of the unit and informing Mr. Sullivan that if the Association wanted to pursue the matter further, it could file a petition with the PELRB and the issue could be litigated there. (Association Exhibit No. 1, p. 2).

DECISION AND ORDER

The New Hampshire Public Employee Labor Relations Board is the administrative agency charged with determining the composition of public employee collective bargaining units. RSA 273-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). Inherent in that authority is the discretion necessary to consider modification petitions.

Modification of a bargaining unit may be accomplished pursuant to the PELRB's administrative rule Pub. 302.05. Pub. 302.05(a) provides, in pertinent part, that:

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...may file a petition for modification of bargaining unit.

Furthermore, Pub. 302.05(b) provides that:

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.

Here, the Association, as the exclusive representative, has filed a modification petition seeking to have the position in dispute added to the certified bargaining unit. At the outset, the District claims that the instant petition should be denied pursuant to Pub. 302.05(b) based upon its contention that there has been no change in circumstances relative to the formation of the existing bargaining unit since negotiation of the CBA presently in force.

The record reflects that the position in dispute was established during the summer of 2001 and that a person (Ms. Gage) was hired to fill the position in August 2001. The evidence moreover indicates that the parties negotiated and executed a successor CBA later that fall.

(Findings No. 3 and No. 20, above). Accordingly, the question arises as to whether or not these circumstances constitute sufficient facts in order to deny the petition pursuant to Pub. 302.05(b)(2). The Hearings Officer concludes that they do.

It is clear from the evidence that Dr. Harris met with Ms. Dutille, the Association's President, before the commencement of the 2001-2002 school year and informed her of the newly created position for the Hanover Street School. At that time, he specifically discussed with her the subject of the position's inclusion in (or exclusion from) the support staff bargaining unit. Dr. Harris testified that Ms. Dutille expressed to him an agreement that the position should not be included. At hearing, the Association did not contest this recollection. Whether or not Ms. Dutille's verbal assent constituted a formal agreement on the matter, the fact remains that upon entering the fall of 2001 the Association was aware of the position's establishment and the nature of the duties that it was performing. It is also clear that the Association elected neither to seek its inclusion in the bargaining unit or otherwise demand to bargain over its working conditions at that time. When the parties' entered into negotiations for a successor agreement later that fall, the Association was still cognizant of the existence of the position and the functions it was performing, yet it made no proposals at the bargaining table regarding the position's bargaining unit status or its working conditions. The contract was ultimately settled without any amendment or modification to the contract's recognition clause.

There was testimony from both Ms. Dutille and Ms. Chaisson that the reason the Association did not seek to have the position added to the bargaining unit was based upon its impression or belief that it was temporary in nature. It is true, in accordance with RSA 273-A:1, IX (d), that persons in a temporary status do not fall within the definition of "public employee," and therefore this would be an appropriate basis to conclude that such a position should be excluded from the bargaining unit. However, the facts at hand do not provide sufficient proof that the position was ever intended to be "temporary." While Ms. Dutille did testify that her understanding or feeling was based upon her conversation with Dr. Harris, and the fact that a problematic group of sixth grade students would eventually be leaving the school, she acknowledged on cross-examination that Dr. Harris never told her that the position was temporary. On the contrary, the fact that Dr. Harris sought the Association's stance regarding the position's placement in a bargaining unit in the first place would itself tend to indicate the permanent nature of the position. If the District intended the position to be temporary, then it understandably would not have sought the Association's input regarding bargaining unit placement.

Ms. Chaisson testified to a conversation she had with Dr. Spiegel, the Principal of Hanover Street School, wherein he referenced the use of grant monies to fund the position and the possibility the position may be temporary. Ms. Dutille confirmed in her testimony that Ms. Chaisson had relayed this information to her, but also indicated that she had later learned that the use of grant monies for the position was untrue. Accordingly, I find that the evidence presented does not establish a sufficient basis to conclude that the position was going to be temporary, and certainly there was no expression of such intent from the Superintendent's office.

It is uncontroverted that during the course of her employment, Ms. Gage's primary role has been monitoring the playground. According to Ms. Chaisson, para-educators have

monitored recess at the Hanover Street School for as long as she has worked at the school, covering a period of sixteen (16) years. The District recognizes the Association as the exclusive representative for all para-educators employed by the District. (Finding No. 3, above). The evidence therefore reflects that commencing in September 2001 Ms. Gage was the only non-paraeducator monitoring the playground and that said function constituted bargaining unit work of the Association. Members of the Association observed and knew these facts, and should have taken the opportunity to either petition the PELRB to have the position added to the bargaining unit or demanded that the District bargain over its working conditions. Nevertheless, the record indicates that the Association did not raise any concerns with the District until late in the second year of the position's existence, at which time any question as to the temporary nature of the position had long been resolved.

It does not appear, however, that the instant petition was filed based upon a belief by the Association that the job had become permanent. Testimony presented by the Association established that concerns arose amongst Association members during the spring of 2003 as to the position's rate of pay and work functions. (Finding No. 22, above). It was this discord that directly led to the meeting between Association representatives and Dr. Harris on May 16, 2003 (Finding No. 23, above) and the eventual filing of the instant petition. In short, there was no evidence presented of a change in circumstances, relative to the formation of the existing bargaining unit, since the current CBA was negotiated.

While the apparent resentment of certain paraprofessionals towards the pay and benefits of Ms. Gage is understandable, this does not constitute "changed circumstances" to otherwise warrant a further processing of the instant petition. These same concerns quite reasonably could have been raised with the District in September 2001 or at the bargaining table later that fall. Given the particular history of this position's creation, the subsequent collective bargaining between the parties, and the passage of nearly two (2) years time, the mandatory language contained in Pub. 302.05(b) requires that the instant petition be denied. This denial, however, should not be construed as prohibiting further discussions between the parties, nor any mutual agreement between them, that results in the subsequent inclusion of the position within the unit. Since the Association's petition is denied pursuant to Pub. 302.05(b), it is unnecessary for the Hearings Officer to address the other objections raised by the District in its answer.

So ordered.

Signed this 12th day of January, 2004.



Peter C. Phillips, Esq.
Hearings Officer