



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Laconia Education Association/NEA-NH

Complainant

v.

Laconia School District, SAU #30

Respondent

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Case No. T-0239-24

Decision No. 2004-028

APPEARANCES

Representing the Laconia School District:

Paul T. Fitzgerald, Esquire

Representing the Laconia Education Association/NEA-NH:

Steven R. Sacks, Esquire, Staff Attorney, NEA-NH

BACKGROUND

On April 28, 2003 the Laconia Education Association/NEA-NH, (hereinafter referred to as the "Association") filed an improper labor practice charge alleging that the Laconia School District SAU #30, (hereinafter referred to as the "District") acting through its employees and agents, unilaterally set the terms and conditions of employment for certain employment positions that adversely affected individuals employed within those positions and would result in the removal of certain positions from the bargaining unit. The Association further alleges that these actions were undertaken in violation of statutory prohibitions against certain employer practices as expressed in RSA 273-A:5 I (e) to refuse to negotiate in good faith, (g) to generally fail to comply with the Public Employee Labor Relations Act (RSA 273-A), (h) to constitute a breach of the parties' collective bargaining agreement (hereinafter referred to as a "CBA") and (i) to invalidate the parties' CBA.

The Laconia School District ("District") filed its answer on May 12, 2003 generally denying that any actions it undertook to utilize a so-called "Specialist's Contract" to govern the employment of individuals employed in certain positions represented a breach of the parties' CBA or violated statutory provisions. The District further answers that the positions of "elementary school psychologist", "LAB (Learning Alternative Behaviors) Supervisor", and "Technology Assistant" are not covered by the parties' CBA and neither these positions nor the additional positions of "ESOL Tutor/Specialist"; "Laconia High School Child Care Manager"; "Laconia High School Career Support Specialist"; "Memorial Middle School Granite Program Specialist"; "Memorial Middle School Alternative Education Specialist"; and "Woodland Heights Behavior Consultant" require the issuance of the "[r]equisite certificate from the New Hampshire Department of Education."

For its part, the District initially raised the issue of whether or not this matter is properly before the PELRB or should be processed under the grievance provision of the parties' CBA. At the pre-hearing conference, the District withdrew that issue and the parties stipulated to the PELRB's subject matter jurisdiction over the Association's complaint. The District reserved its right to pursue a potential dismissal for failure of the Association to file their complaint in a timely fashion.

Initially, a hearing on the District's Motion to Dismiss was conducted at which time the Board unsuccessfully attempted to hear the case based solely upon offers of proof. At the conclusion of the parties' arguments, the board deliberated and determined that it would be necessary for it to conduct a full evidentiary hearing at which time the parties would present evidence on both the motion and the merits of the case. For its part, the Association elected to amend its original complaint eliminating several employment positions originally included from consideration at hearing. The complaint went forward to a final evidentiary hearing involving the District's actions affecting only the positions of Learning Alternative Behavior (LAB) Supervisor at the Memorial Middle School, Technology Assistants at the Elm Street School, Pleasant Street Elementary School, and Woodland Heights School. That hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on January 6, 2004 at which both parties were represented, and had the opportunity to present witnesses and exhibits and to cross-examine witnesses. Also, at the request of the Association's counsel, and without objection, the Board took administrative notice of the Association's unit certification on file with the PELRB. The Board held the record open to allow the Association to provide copies of certain documentary evidence involving Department of Education regulations that it represented had been previously submitted into the record during the hearing and any responsive submission by the District. Upon receipt of post-hearing submissions by both parties, the Board closed the record, reviewed the respective cases as submitted and determined the following:

FINDINGS OF FACT

1. The Laconia School District ("District") employs individuals within its several schools and therefore is a public employer within the meaning of RSA 273- A:1, X.

2. The Laconia Education Association ("Association") is the certified exclusive bargaining representative for certain individuals employed by the Laconia School district, as evidenced by its "Certificate of Representative and Order to Negotiate" on file with the PELRB. The unit description contained in that document states, in relevant part, as follows:

"CERTIFIED TEACHING PERSONNEL, SCHOOL LIBRARIANS & GUIDANCE PERSONNEL (Per Agreement, Article I, Recognition, May 12, 1976)..." (Administrative Notice Exhibit #1)

3. The District and the Association are parties to a collective bargaining agreement ("CBA") for the period July 1, 2000 to June 30, 2003 that contains an agreed recognition clause. (Association Exhibit #1).
4. The District executed so-called "Specialist Contracts" on various dates occurring in May and June of 2002 with several employees without reference to the CBA existing at the time between the District and the Association and containing different terms and conditions of work from those expressed in the parties' CBA. (District Exhibit B)
5. The terms and conditions expressed within these specialist contracts were to continue in effect through, at least June 30, 2003 as were corresponding, though dissimilar, terms and conditions contained within the parties' CBA also scheduled to expire on June 30, 2003.
6. The District refers to the individuals subject of the Association's complaint and with whom it entered into so-called "specialist contracts" as: George Kalipolites, LAB Supervisor; Coleen Poire, Technology Assistant; Lizbeth Rosenfield, Technology Assistant; and Michelle Plourde, Technology Assistant.
7. The Association refers to the subject individuals as: George Kalipolites, LAB Supervisor; Coleen Poire, Librarian; Lizbeth Rosenfield, Librarian; and Michelle Plourde, Librarian.
8. No witness testimony or documentary evidence established that any of the individuals holding these positions were either "certificated teaching personnel" as referenced in the "Certificate of Representative and Order to Negotiate" or that any of the positions at issue "required the employee to hold an appropriate credential issued by the State Board of Education..." as referenced in the recognition clause of the parties' CBA.
9. Association witness George Kaliopolites is employed as a LAB Supervisor and testified that to be considered as a teacher a certificate was required from the State Board of Education. He further testified that the District did not require him to have a certificate to be employed in his present position.
10. Association witness Lisbeth Rosenfeld is employed as a Technology Assistant and testified that Michele Plourd and Coleen Poire, others subject to this proceeding, were also employed as Technology Assistants. She also testified that no certificate was required from the State Board of Education and that she was not required to have one to be employed in her present position.

11. Robert Gunther is a long time Association official and testified that he did not know if any certificate is required for individuals to be employed in the subject positions.
12. Deborah A. Clark-Tivey is the president of the Association and testified that the Association did not attempt to "pursue the issue [of the inclusion of these positions in the unit] in negotiation as the Association "had enough issues going on."
13. The names of those individuals at issue in these proceedings did not appear on any list of names generated by the District purporting to be a list of all bargaining unit members of the Association.
14. No regulations or other documents adopted by the New Hampshire State Board of Education or other agency were presented as evidence that established that any of these positions required individuals employed in the positions at issue to possess a certificate.
15. Any certificates held by any of the individuals employed in the subject positions were not obtained at the request or requirement of the District as a qualification for that individual's employment.
16. The District did not require a State Board of Education certificate as a qualification to be employed in any of these positions.
17. Neither the parties' "Certificate of Representative and Order to Negotiate" nor the recognition clause of the parties' CBA includes the position of LAB Supervisor or Technology Assistant.
18. The specialist contracts presented to the employees at issue are annual agreements and similar contracts will continue to be used by the District in the future.

ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has sole original jurisdiction to adjudicate claims by the exclusive representative of a certified bargaining unit comprised of individuals employed by a "public employer" as defined in RSA 273-A:1, I. (See RSA 273-A:6, I) The PELRB also is authorized to determine whether claims alleging the commission of an improper or unfair labor practice pursuant to RSA 273-A:5, I are filed in a timely manner as calculated in RSA 273-A:6, VII.

DECISION

The board examines the timeliness of the filing of a complaint alleging the commission of an unfair labor practice by determining the date of the occurrence from which the six-month limitation for filing runs. Where a violation may be deemed to be of a continuing nature the

permissible period within which a complaining party may file its complaint is extended to within six months of the expiration of the continuing violation. The Board finds that the violations alleged to have occurred in this case are of a continuing nature because, if proven by the Association, the impact of the disparity of wages and benefits continues through the duration of the CBA. Therefore, the District's request for dismissal of the Association's complaint on the basis of an untimely filing is denied.

Proceeding to the merits of the Association's complaint, the Board finds that the evidence presented by the Association, considered in a light most favorable to it, is insufficient to prove that the individuals employed in the subject positions were members of the bargaining unit subject to the parties' CBA. Therefore the complaint of unfair labor practice on the part of the District is dismissed.

DISCUSSION

The instant action arises from the filing of a complaint by the Association against the District alleging that the District has undertaken actions that violate statutory prohibitions against certain employer practices as expressed in RSA 273-A:5 I §(e) refusing to negotiate in good faith, §(g) generally failing to comply with the Public Employee Labor Relations Act (RSA 273-A), §(h) to constitute a breach of the parties' collective bargaining agreement and §(i) to invalidate the parties' CBA. The District is alleged to have entered into separate employment agreements with several employees without negotiating the terms of those agreements with the Association. The execution of these several agreements occurred in May and June of 2002 and the terms and conditions of work continued throughout the school year of 2002-2003. The Association's complaint was filed with the PELRB on April 28, 2003. To constitute a requisite "timely" filing of a complaint with the PELRB, the complaining party must have filed within six months of the occurrence from which the cause of action arises. RSA 273-A:6, VII. Since the violations that result from disparate treatment of employees are to continue throughout the school year, the board finds the Association complaint to have been timely filed.

The Association is the duly certified exclusive bargaining representative for a bargaining unit whose composition is on record with the PELRB is as follows:

"CERTIFIED TEACHING PERSONNEL, SCHOOL LIBRARIANS & GUIDANCE PERSONNEL (Per Agreement, Article I, Recognition, May 12, 1976). EXCLUSIONS: Supt., Asst. Supt., Business Admn., Principals, Asst. Principals, Director Guidance, Coordinator of Special Ed., Vocational Director, and persons employed by State Board of Education."

At some point subsequent to the original certification granted in 1976, the parties' negotiated the following descriptive language into the Recognition Clause of their collective bargaining agreements which in relevant part states:

"recognizes the Association as the exclusive representative of all teachers of the Laconia School District during the term of this Agreement. The term

"teacher" shall include any individual employed by the District, the qualifications of whose position are such as to require the employee to hold an appropriate credential issued by the State Board of Education.."
(Association Exhibit #1, ARTICLE I – RECOGNITION, CBA 2001-2003)

To the extent that the language in the recognition clause is useful to the Board at all, it tends to further establish that the parties intended this particular bargaining unit to be comprised of certain individuals holding an "appropriate credential" issued by the Board of Education.

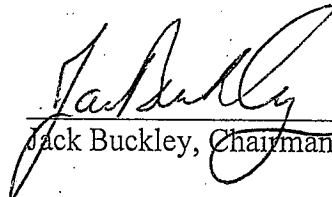
Since the Board is restricted by court decision to apply the unit composition description as originally certified or any modification to the unit composition subsequently certified, we must look to the official certification of this bargaining unit composition on file with the PELRB. In doing so we find the subject positions not included in the original certification and also find that there have been no subsequent modifications of the unit's composition duly certified.

The Association's witnesses testified that the positions at issue lacked the requirement that the individuals be certified. There also is a lack of any documentary evidence to establish that these individual positions required certificates from the State Board of Education. Viewing the evidence in a light most favorable to the Association, we conclude that the Association failed to establish that these individuals met the existing criteria of those employees certified to be members of the bargaining unit. Therefore, the Association has failed to prove that the District violated any provisions of the statute when it entered into employment contracts with the individuals in these positions as they were not certified members of the bargaining unit at the time.

The District's motion to dismiss the Association's complaint for failing to establish its *prima facie* case is GRANTED. Nothing in this decision is intended to prevent the parties from subsequently modifying the composition of this unit upon the modification being approved by the PELRB.

So Ordered.

Signed this 22nd day of March, 2004



Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members Seymour Osman and Richard E. Molan also voting.

Distribution:

Steven R. Sacks, Esquire, Staff Attorney, NEA-NH
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