



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Lyndeborough Support Staff Association,
NEA-New Hampshire

Petitioner

v.

Lyndeborough School District

Respondent

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Case No: T-0418

Decision No. 2004-141

APPEARANCES

Representing the Lyndeborough Support Staff Association, NEA-NH:

Philip G. Pratt, NEA-NH UniServ Director

Representing the Lyndeborough School District:

William J. Phillips, Esq.

BACKGROUND

The Lyndeborough Support Staff Association/NEA-New Hampshire (hereinafter "the Association") filed a Petition for Certification with the Public Employee Labor Relations Board (PELRB) on February 25, 2004 seeking to certify a bargaining unit consisting of Special Education Assistants, Library Assistant, Building Aide, Secretary, Enrichment Aide, Computer Lab Assistant, Title I Aide, ESOL¹ Assistant and Reading Specialist. The Lyndeborough School District (hereinafter "the District") filed its exceptions to the Association's Petition for Certification on March 11, 2004 raising several issues with respect thereto and requesting, among other things, that the petition be dismissed.

The District asserts that the positions of Library Assistant and Building Aide are two positions held by one employee and thus cannot be counted as "two" in meeting the statutory

¹ "ESOL" is an acronym for "English Speakers of Other Languages."

minimum of ten (10) employees. The District contends that the positions of Title I "aide" and Reading Specialist (or, more appropriately, "Reading Instructor") are two positions held by one employee and thus also cannot be counted as "two" in meeting the statutory minimum of ten (10) employees. It states that the Title I position should be excluded because the employer is not the District, but rather is School Administrative Unit #63 ("SAU #63"), of which the District is one of four (4) school districts. Moreover, the District maintains that the position of Secretary falls within the category of administrative personnel that the petition itself explicitly excludes, and also that as it is the only administrative assistant to the principal of the single school in the district, the position implies a confidential relationship to the public employer. Accordingly, the District argues that the Secretary position falls outside the definition of a "public employee" pursuant to RSA 273-A:1, IX and must be therefore be excluded from the bargaining unit as a matter of law.

The District also contends that four positions included in the petition lack a sufficient "community of interest" as required by RSA 273-A:8 I and NH Pub 302.02 and should, therefore, be excluded from the proposed unit, namely the positions of ESOL Instructor, Reading Instructor, Secretary and Enrichment Consultant. Accordingly, after the removal of the positions of Title I Instructor, Reading Instructor, Secretary, ESOL Instructor and Enrichment Consultant, and counting the single employee working as Building Aide/Library Assistant as "one," there are only eight (8) employees remaining in the proposed bargaining unit. Based upon the foregoing, ~~the District requests, inter alia, that the PELRB find that the proposed unit contains an~~ insufficient number of employees and that the petition be denied.

A hearing on the merits of the Association's petition was conducted on April 21, 2004 before the undersigned 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 representatives, 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, it was stipulated that the position of Title I Aide is appropriately excluded from any bargaining unit and it was withdrawn from the petition. It was also agreed that the job titles for the positions of Reading Specialist, Library Assistant, Computer Lab Assistant, ESOL Assistant, and Enrichment Aide, as referenced in the petition, are appropriately referenced as Elementary English/Language Arts ("EELA") Teacher, Library Consultant, Computer Consultant, ESOL Instructor, and Enrichment Consultant, respectively. Following submission of the Association's case, the District moved to dismiss, based upon its contention that the Association had failed to meet its burden of proof of establishing a "community of interest" for the proposed bargaining unit. The Association objected. The Hearing Officer took the motion under advisement, and then invited the District to proceed with its case, if any, in response. Expressing its reservations and without prejudice to its pending Motion to Dismiss, the District thereupon presented its case. At the conclusion of the hearing, the record was closed subject to the filing of post-hearing briefs and reply briefs by the parties, which were filed with the PELRB on May 5, 2004 and May 12, 2004, respectively.

FINDINGS OF FACT

1. The Lyndeborough School District ("the District") is a public employer within the meaning of RSA 273-A:1 X.
2. The Lyndeborough Support Staff Association/NEA-New Hampshire (hereinafter "the Association") has petitioned to become the exclusive bargaining representative of a proposed bargaining unit consisting of the following positions: Special Education Assistants, Library Consultant, Secretary, Computer Consultant, ESOL Instructor, Enrichment Consultant, Building Instructional Aide, and Elementary English/Language Arts ("EELA") Teacher.
3. In its' filing of March 11, 2004, the District did not raise any exception to the inclusion within the same bargaining unit of the positions of Special Education Assistant and Computer Lab Assistant. The total number of employees in these positions is seven (7).
4. Madeline Mauro currently holds the positions of Building Instructional Aide and Library Consultant. (Joint Exhibit Nos. 1 and 2). As Library Consultant, Ms. Mauro and Principal Susan Tussing signed a "Notice of Employment" for the period July 1, 2003 to June 30, 2004, establishing a rate of pay for the position of \$11.70 an hour and a schedule of ten (10) hours per week for a period of thirty-six (36) weeks. (Joint Exhibit No. 1). As Building Instructional Aide, Ms. Mauro and Principal Tussing signed another "Notice of Employment" for the period July 1, 2003 to June 30, 2004, establishing a rate of pay for the position of \$9.50 an hour and a schedule of fifteen (15) hours per week for a period of thirty-six (36) weeks. (Joint Exhibit No. 2).
5. The District employs Wendy Baron in the position of Secretary at the Lyndeborough School. Ms. Baron works in the Principal's office, under the direct supervision of Principal Susan Tussing. Among her duties are answering the phone and retrieving voice mail messages, preparing correspondence, copying, retrieving and opening the mail, use of the office fax machine and review of incoming correspondence, and other administrative functions on behalf of Ms. Tussing. Ms. Baron has served as a witness to the signing of District employment agreements. (See Joint Exhibit Nos. 1 and 2) Although personnel files are maintained in the principal's office, Ms. Baron testified that she is not permitted to access such files. She stated that she has no involvement in the teacher contract negotiations. Ms. Baron testified that she is aware of the instant petition for certification and that in her opinion it is appropriate for the support staff employees to organize. On cross-examination, Ms. Baron acknowledged that she performs the administrative work for Ms. Tussing, and that she was unaware of who would carry out such duties if she could not do so.
6. Ms. Baron signed a "Notice of Employment" form with the District for the 2003-2004 school year establishing her rate of pay at \$12.00 an hour and a schedule of thirty four and a half (34.5) hours per week for a period of forty (40) weeks. (Joint Exhibit No. 4).

7. The Enrichment Consultant, Jan Henry, signed a "Notice of Employment" with the District for the period July 1, 2003 to June 30, 2004, establishing a rate of pay for the position of \$11.50 an hour and a schedule of five (5) hours per week for a period of thirty-six (36) weeks. (Joint Exhibit No. 3).
8. Sheila MacDuff was employed as the Elementary English/Language Arts ("EELA") Teacher for the District during the 2003-2004 school year. Ms. MacDuff signed two Teacher Contracts with the District during the course of the school year, specifically on October 14, 2003 and April 12, 2004, that established her rate of pay, benefits and term of employment. (Joint Exhibit No. 6).

DECISION AND ORDER

JURISDICTION

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).

SUMMARY OF DECISION

The District's Motion to Dismiss is granted. The Association, as the petitioner in these proceedings, bears the burden to prove, by a preponderance of the evidence, that the bargaining unit proposed in its Petition for Certification is appropriate for certification under RSA 273-A:8. See N.H. CODE ADMIN. R. PUB 201.06 (b) and (c). Here, the evidentiary record presented by the Association is insufficient to establish a "community of interest" that is shared amongst ten (10) or more employees, and thus the petition must be denied at this time.

DISCUSSION

Through the instant Petition for Certification, the Association seeks to certify a bargaining unit consisting of various staff positions within the District. The formation of a bargaining unit is governed by the provisions of RSA 273-A:8, the provision of the law that establishes criteria for the PELRB to take into consideration when determining an appropriate bargaining unit. RSA 273-A:8 I specifically provides that "[i]n making its determination the board should take into consideration the principle of community of interest. The community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:

- (a) Employees with the same conditions of employment;
- (b) Employees with a history of workable and acceptable collective negotiations;
- (c) Employees in same historic craft or profession; [and]
- (d) Employees functioning within the same organizational unit."

RSA 273-A:8 I further requires that "in no case shall the board certify a bargaining unit of less than 10 employees with the same community of interest." Given that the District has filed exceptions to the instant petition, in these adjudicative proceedings it is the Association that bears the burden of establishing a sufficient "community of interest," as shared amongst the various employees referenced in the petition, and that there are at least ten (10) or more of such employees. PELRB regulations bestow upon the petitioner the burden of going forward with a case and the obligation to prove the proposition that it asserts by a preponderance of the evidence. N.H. CODE ADMIN. R. PUB 201.06 (b) and (c). Here, the Association asserts that its proposed bargaining unit consists of thirteen (13) employees, all of whom, it claims, appropriately share a "community of interest" and otherwise may be certified under the law.

As referenced above, upon completion of the Association's case, the District moved to dismiss the Association's petition. It argued that the Association had not met carried its burden of proof in the case in establishing that the proposed bargaining unit is one that may be certified. Considering all evidence presented by the Association in a light most favorable to the non-moving party, namely the Association, the Hearing Officers finds that he must agree with the District in that there are simply insufficient facts in the record to support the certification of a bargaining unit at this time.

The record reflects that the evidence presented by the Association was limited to testimony from one witness, that of the Secretary, Ms. Baron. Documentary evidence relating to the working conditions of other positions was limited to assorted joint exhibits. (See Findings of Fact, above). No evidence or information was ever presented by the Association relative to the positions of Special Education Assistants, the Computer Consultant, or the ESOL Instructor. While the Hearing Officer has considerable evidence regarding the position of Secretary, both testimonial and exhibit, and some limited evidence regarding the positions of Building Instructional Aide, Library Consultant, Enrichment Consultant and the EELA Teacher (See Joint Exhibits Nos. 1, 2, 3 and 6, above), he has no such information in the record relating to Special Education Assistants, the Computer Consultant, or the ESOL Instructor. Therefore, even though the community of interest shared among the Secretary, Building Instructional Aide/Library Consultant, Enrichment Consultant and the EELA Teacher can be evaluated and assessed following the submission of the Association's case, the Hearing Officer cannot determine the community of interest, if any, that these positions have with the Special Education Assistants, Computer Consultant and ESOL Instructor.

Under the circumstances, even if the Hearing Officer was to conclude that the Secretary, the Building Instructional Aide/Library Consultant, the Enrichment Consultant and the EELA Teacher all shared a sufficient community of interest to form a bargaining unit, and otherwise found that they each satisfied the definition of public employee under RSA 273-A:1 IX, combined they do not satisfy the ten (10) or more requirement set forth in RSA 273-A:8 I. At most, these positions are comprised of only five (5) employees.² The resulting consequence is that in order for the instant petition to have a sufficient number of employees to form a bargaining unit under RSA 273-A:8 I, the Special Education Assistants, of which there are six

² The Hearing Officer acknowledges, but does not rule upon, the District's argument that, as a matter of law, the Building Instructional Aide and the Library Consultant may only count as only one (1) employee.

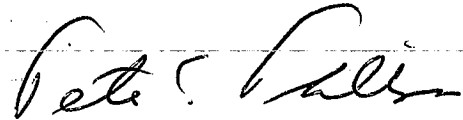
(6) in number, must be included. However, there is no evidence in the record at this time to support their inclusion, nor the inclusion of the Computer Consultant and ESOL Instructor as well. Indeed, given the state of the record at the conclusion of the Association's case, there was no evidence for the Hearing Officer to consider in determining the appropriateness for inclusion or exclusion of these positions into the bargaining unit.

The Hearing Officer observes that since the District did not raise a "community of interest" issue with respect to the Special Education Assistants and the Computer Consultant in its' list of exceptions, one could reasonably presume that it was not contesting the issue with respect to those positions. However, in order to prove that other employees may be included in a bargaining unit along with them, their working conditions would still need to be presented and made part of the record. The Association, as the petitioner, bears the burden in this regard.

Therefore, on the District's Motion to Dismiss for failure of the Association to carry its burden, the instant petition is dismissed without prejudice at this time. Since the Association's petition is dismissed pursuant to Pub. 201.06 (b) and (c), it is unnecessary for the Hearing Officer to address the other exceptions raised by the District in its answer.

So ordered.

Signed this 26th day of August, 2004.



Peter C. Phillips, Esq.
Hearing Officer

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