



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Brookline Teachers Association, NEA-New Hampshire

v.

Brookline School District, SAU #41

Case No. E-0116-1
Decision No. 2011-324

Appearances:

James F. Allmendinger, Esq., NEA-NH, Concord, New Hampshire for the Complainant

Pierre A. Chabot, Esq., Wadleigh, Starr & Peters, P.L.L.C., Manchester, New Hampshire for the Respondent

Background:

The Brookline Teachers Association, NEA-New Hampshire filed an unfair labor practice complaint on April 22, 2011 claiming that the Brookline School District violated RSA 273-A:5, I (a), (e), (g), and (h) by refusing to recognize Occupational Therapists and Speech Language Pathologists (Allied Health Professionals) as members of the bargaining unit, by unilaterally changing the terms and conditions of their employment, and by failing to file a unit modification petition with the PELRB. The Association asserts that the District's past practice has been to treat Allied Health Professionals as members of the bargaining unit. The Association amended its complaint by adding a claim that the District refused to process the grievances concerning the subject employees to arbitration. See PELRB Decision No. 2011-171. The Association requests that the PELRB order the District to return to the status quo and continue to recognize Allied Health Professionals as members of the bargaining unit.

The District denies the charges and asserts, among other things, that Allied Health Professionals are not included in the bargaining unit because, under the PELRB certification, the

bargaining unit consists of permanent teachers and Allied Health Professionals are not certified or recognized as teachers; that the complaint is untimely; and that the Association did not request arbitration of the subject grievances.¹ The District requests that the PELRB dismiss the complaint.

The undersigned hearing officer conducted a hearing on June 23, 2011 at the Public Employee Labor Relations Board offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The District is the public employer within the meaning of RSA 273-A:1, X.
2. The Association is the certified exclusive representative of employees holding positions in the bargaining unit described as “[a]ll permanent teachers” pursuant to the PELRB September 16, 1987 Certification of Representative and Order to Negotiate (Case No. T-0376). Neither the District nor the Association has successfully petitioned the PELRB to modify the composition of the bargaining unit; and the composition of the bargaining unit has not been otherwise modified by the PELRB since the issuance of the September 16, 1987 Certification.
3. The District and the Association are the parties to a collective bargaining agreement (CBA) effective from July 1, 2006 to June 30, 2011. See District Exhibit A.²
4. Article II of the parties’ 2006-2011 CBA, titled Recognition, provides:

Section 2.01 Association
The Board recognizes the Association as having been certified by the New Hampshire Public Employees Labor Relations Board, herein after referred to as “NH PELRB”, pursuant to RSA 273-A, as the exclusive representative of the bargaining unit consisting of all certified teachers and the school nurse(s).

¹ The District asserts these defenses in its answer and in two separately filed motions to dismiss.

² All exhibits referenced herein are incorporated in full into the Findings of Fact.

Section 2.02 NH.PELRB

The above section shall not prejudice either party's position in petitioning for modification of the bargaining unit before the NH PELRB.

The language of the Recognition clause has not changed since at least 1991. See District Exhibit A and Association Exhibit 1.

5. The parties' CBA contains a grievance procedure consisting of the following four steps: Building Principal, Superintendent, School Board, and binding arbitration. Section 7.01 of the CBA defines grievance as "a complaint by a staff member or members, or the Association that there has been a violation, misapplication or misinterpretation of any provision of the Agreement." See District Exhibit A.

6. Section 7.03 of the CBA provides that a "staff member covered by this Agreement shall, under this article, have the right to have an Association representative present at any time, subject to his/her requesting such representation"; and Section 7.05 (f) provides that "[g]rievance(s) of a general nature, or involving decision by the Superintendent or School Board, may be submitted by the Association to Level 2." District Exhibit A.

7. Section 7.04 of the CBA provides that a "grievance, to be considered under this procedure, must be initiated in writing within twenty (20) school days of its occurrence by the aggrieved person(s)." District Exhibit A.

8. Prior to July, 2010 Allied Health Professionals were treated in a manner consistent with the CBA between the District and the Association. See Stipulated Statement of Facts at 6.

9. The District included Allied Health Professionals on the lists of bargaining unit employees provided to the Association upon its request in 2001, 2003 and 2010. The Association utilized these lists to prepare salary proposals for the collective bargaining negotiations between the parties. See Association Exhibits 7-9.

10. Prior to July, 2010, Speech/Language Pathologist Lori Meader and Occupational Therapist Marcia Bruseo received employment contracts entitled "Teacher Contract," in which they were referred to as teachers. See Association Exhibits 2 and 3.

11. On July 12, 2010, the District issued letters to Allied Health Professionals, including Ms. Meader and Ms. Bruseo, to confirm their reemployment. The individual contracts for Allied Health Professionals contained terms and conditions which were not identical to those contained in the collective bargaining agreement between the District and the Association. See Stipulated Statement of Facts at 7 and 8.

12. The District hired Brittany Kofstad as Occupational Therapist and Sarah Gravel as Speech/Language Pathologist in late October and early November, 2010, respectively. The "offer of employment" letters, sent to Ms. Kofstad on October 27, 2010 and to Ms. Gravel on November 5, 2010, included individual contracts. Although their contracts contained some provisions that were identical to those in the CBA between the Association and the District, they also contained terms and conditions of employment which were different from those contained in the CBA.

13. Ms. Kofstad's employment contract included the following provisions:

EMPLOYEE RIGHTS

...
Every employee shall have the rights set forth in RSA 273-A

...
Discipline

Any Allied Health Professional shall be entitled to have present a representative of the Association during any meeting which involves or may involve disciplinary action. When a request for such representation is made, no action shall be taken with respect to the employee until such representative of the Association is present.

See Association Exhibit 4. Ms. Gravel's employment contract did not contain references to the right to be represented by the Association. See Association Exhibit 5.

14. After receiving her employment contract, Ms. Kofstad contacted the Association in November, 2010 trying to determine, among other things, what representation she could expect from the Association. According to Association President Karen Pillion, the Association was not aware of the changes the District made to the Allied Health Professionals' contracts until it received an inquiry from Ms. Kofstad regarding her contract.

15. Ms. Kofstad contacted District Human Resources Coordinator Lori Thibault with questions regarding her contract. Ms. Thibault responded on December 23, 2010 to Ms. Kofstad's inquiry by stating in part:

The Occupational Therapist position is no longer covered under the negotiated agreement for the teacher's union. Your contract must still have a few references in it that should not be there...

The salary schedule/track referenced in your contract does refer to the schedule in the teacher's negotiated agreement which I can give you, however, the teachers are currently in negotiations right now so anything I give you would be for this current year only.

It is, however, our understanding that your salary will be equivalent to the teacher's salary schedule but, because you're not part of the teachers union, there is no requirement to follow the schedule.

Association Exhibit 4-A.

16. On February 3 and 4, 2011 Ms. Pillion submitted step 1 grievances on behalf of Allied Health Professionals to the School Principals alleging that the July 12, 2010 reemployment letters violated the parties' CBA. The grievances provided in part:

... Past practice has been that these professionals received a teachers' contract and were covered by the agreement between the BTA and the Brookline School Board. As of this school year they have received a different, free standing Allied Health Professionals contract. Those on a continuous contract and new hires have received mixed information and have been supplied with a variety of documents outlining their benefits. The specific articles that have been violated are Article II Recognition, Article V Employee rights, and Article XI Professional Compensation.

Relief sought: That all allied health professionals continue to be recognized as a part of the Brookline Teachers Association bargaining unit.

Association Exhibit 6.

17. On February 4, 2011 these grievances were forwarded to step 2 based on the decision of the building principals involved that they were not in a position to resolve contractual disputes. See Association Exhibit 6.

18. On February 14, 2011 the Association submitted step 2 grievances to Superintendent Susan Hodgdon. See Association Exhibit 6.

19. On March 1, 2011 Superintendent Hodgdon denied the grievance on the ground that Allied Health Professionals were not included in the bargaining unit. The Superintendent's response provides in part:

In determining the status of the Allied Health professional under the 2006-2011 collective bargaining agreement, I note in Article 2.01 (the Recognition Article) that the Association is "the exclusive representative of the bargaining unit consisting of all certified teachers and the school nurses...."

Thus, in my reading of this article and applying it to the issuance of contracts, I do not find that the Allied Health professionals are recognized in this agreement. That said, I respectfully suggest that the Association may not have the standing to bring forward a grievance on behalf of those not recognized under the agreement.

However, I also noted in the grievance description that there is concern about the mixed information that Allied Health professionals have been given regarding their at-will contracts with the Brookline School Board. I would encourage those with questions or concerns to please contact me directly so that I can be of assistance to them.

Level 2 Decision: The Association, based on the collective bargaining agreement Recognition Article (2.01), does not have the standing necessary to bring forward a grievance for the Allied Health professionals, regardless of past practice.

District exhibit G.

20. The Association has not requested arbitration of the grievances filed on behalf of Allied Health Professionals.

21. There is no evidence in the record to show that either Speech Language Pathologists or Occupational Therapists were employed in the District at the time the bargaining

unit was certified in 1987.

22. Allied Health Professionals receive the same benefits as teachers. Similarly to teachers, they work with students, undergo evaluations, and attend faculty meetings and professional development seminars. Along with teachers and administrators, the Allied Health Professionals attend meetings with students' parents. They maintain logs of student interactions but do not prepare learning goals or lesson plans.

23. According to Superintendent Hodgdon, teachers employed by the District provide classroom instruction, prepare learning goals and lesson plans, and are required to be certified by New Hampshire Department of Education and to be trained, among other things, in specific subjects/disciplines, in assessment, testing, evaluating testing data, and in setting educational programs. A teacher's primary focus is on classroom instruction, which requires knowledge of a particular subject/discipline as well as knowledge of pedagogy, classroom management, and assessment methodology. See District Exhibit HH. Allied Health Professionals provide therapeutic services and are not trained to provide classroom instruction on core subjects, such as mathematics, reading, English, foreign languages, and arts, or on non-core subjects.

24. Occupational Therapists employed by the District are not certified by the New Hampshire Department of Education. Speech/Language Pathologists employed by the District are appropriately licensed and automatically certified, pursuant to RSA 189-14-e, II.

Decision and Order

Decision Summary:

Speech/Language Pathologists and Occupational Therapists are not covered by the 1987 PELRB bargaining unit certification or by the parties' collective bargaining agreement. Accordingly, the Association's complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The Association claims that the District violated RSA 273-A:5, I (a), (e), (g), and (h) by refusing to recognize Allied Health Professionals as members of the bargaining unit, by unilaterally changing the terms and conditions of their employment, by failing to process their grievances, and by failing to file a unit modification petition with the PELRB. The District argues that the Allied Health Professionals are not within the bargaining unit and that the Association's complaint should be dismissed because it was not filed within the statutory 6-month limitation period. The District also seeks dismissal of the "refusal to arbitrate" claim on the ground that the Association failed to allege that the District had refused to proceed to arbitration. Because the resolution of the District's motions to dismiss depends in the first instance on whether the Allied Health Professionals are within the bargaining unit represented by the Association, I will first address this issue.

RSA 273-A:8, I establishes the PELRB's authority to determine appropriate bargaining units and certify exclusive representatives thereof. Once the PELRB has determined the composition of a bargaining unit and issued a certification, only the PELRB can modify the existing certified bargaining unit through a process that requires the filing of a proper modification petition. See RSA 273-A:8, I and Pub 302.05. Unit descriptions in PELRB certifications cannot be modified by past practice between the parties or by collective bargaining agreements. *Town of Milford v. AFSCME Local 3657, Milford Police Employees*, PELRB Decision No. 2007-183. The PELRB cannot recognize or effectuate a modification of a bargaining unit, in the absence of proper modification proceedings, on the basis of a public

employer's conduct because the PELRB lacks jurisdiction to fashion an appropriate equitable remedy under equitable estoppel or other potentially applicable equitable doctrine. *See Appeal of Somersworth*, 142 N.H. 837, 841 (1998). See also *Hollis School Board v. Hollis Education Association/NEA-NH*, PELRB Decision No. 2011-045; *Town of Milford v. AFSCME Local 3657, Milford Police Employees*, PELRB Decision No. 2007-183.

In this case, the 1987 certification describes the bargaining unit as “[a]ll permanent teachers” and the composition of the unit has not been changed through the modification process. Therefore, only permanent teachers are included in the unit and the only remaining issue is whether the term “permanent teacher” utilized in the PELRB certification is inclusive of Speech/Language Pathologists and/or Occupational Therapists.

Here, the evidence is insufficient to establish that the Allied Health Professionals are teachers. While a teacher's primary focus is on classroom instruction, which requires knowledge of a particular discipline as well as of pedagogy, classroom management, and assessment methodology, the Allied Health Professionals are therapeutic specialists; and there is no evidence in the record to indicate that they have been trained in providing classroom instruction on a particular subject or discipline. Occupational therapy and speech language pathology are services “designed to meet the health needs of a student by facilitating the reduction of a physical or mental impairment and providing rehabilitation.” See N.H. Admin. Rules He-M 1301.04 (a). Occupational therapy services “include any evaluations, treatments, consultations, supplies, or equipment recommended by a certified occupational therapist to be necessary to implement a program of activities in order to develop or maintain adaptive skills necessary to achieve adequate and appropriate physical and mental functioning of a student.” See N.H. Admin. Rules HE-M 1301.04 (j). Services provided by a speech/language pathologist are “necessary for the evaluation, diagnosis and treatment of speech, language, and hearing disorders which result in

communication disabilities . . .” See N.H. Admin. Rules He-M 1301.04 (t). Although, Allied Health Professionals provide important therapeutic services to students, they do not provide classroom instruction on either core or non-core subjects and, therefore, they are not “teachers” in a common understanding of this word. In addition, there is no evidence that when the PELRB issued a certification in 1987, the term “permanent teachers” included Speech Language Pathologists and Occupational Therapist or that they were employed by the District in 1987.

The evidence in this case does demonstrate that for a number of years the District treated the Speech Language Pathologists and Occupational Therapists as teachers for the purpose of CBA application. For example, they were given contracts identical to teachers’ contracts and to the CBA until 2010 and were referenced in bargaining unit wage schedules provided by the District to the Association during collective bargaining. This prior course of conduct, however, is not dispositive of whether the Allied Health Professionals are within the bargaining unit because, under *Appeal of Londonderry School District*, 142 N.H. 677, 682 (1998), an employer may provide non-bargaining unit employees with the same terms and conditions of employment as bargaining unit employees without “fear of enlarging the bargaining unit”; and collective bargaining agreements “may reflect the rights of employees not included in bargaining units.” *Id.* (citations omitted).

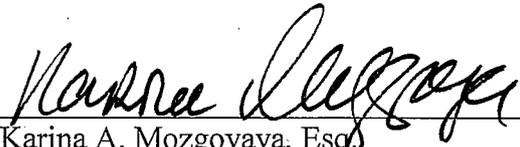
For the foregoing reasons, the Speech/Language Pathologist and Occupational Therapist positions are not within the certified bargaining unit represented by the Association and are not covered by the CBA between the District and Association. Therefore, the District did not have an obligation to inform the Association of any changes it made to the terms and conditions of Allied Health Professionals’ employment or negotiate them. The District did not breach the parties’ CBA by modifying the Allied Health Professionals’ contracts or by dismissing the grievances filed by the Association and did not otherwise violate RSA 273-A:5, I (a), (e), (g), and/or (h).

Furthermore, because the disputed positions are not covered by the parties' CBA, the District had no obligation to proceed to arbitration on the Association's grievances, even if the Association did request arbitration, which it did not do. In addition, the Association's claims that the District committed an unfair labor practice by failing to file a unit modification petition with the PELRB is without merit as the Association failed to establish that RSA 273-A and/or the PELRB Administrative Rules require the employer to initiate modification process under the circumstances of this case. These findings resolve the case and also moot the issues raised in the District's two motions to dismiss, and it is, therefore, unnecessary to separately address these motions.

Accordingly, the Association's complaint is dismissed.

So ordered.

December 22, 2011


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

Distribution:

James F. Allmendinger, Esq.
Pierre A. Chabot, Esq.
Kathleen C. Peahl, Esq.