



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Specialists of Monadnock District, SAU 93/NEA-NH

and

Monadnock Regional School District, SAU 93

Case No. E-0129-1
Decision No. 2012-086

Appearances:

Michelle Couture, UniServ Director, NEA-NH, Concord, New Hampshire for the Petitioner

James O'Shaughnessy, Esq., Upton & Hatfield, LLP, Concord, New Hampshire for the Respondent

Background:

The Specialists of Monadnock District, SAU 93/NEA-NH (Association) filed a petition for certification on February 2, 2012 seeking to represent certain employees of the Monadnock Regional School District (District). The District objects to the petition claiming that the employees in the proposed bargaining unit lack the requisite community of interest, that the proposed unit inappropriately includes supervisors along with persons they supervise in violation of RSA 273-A:8, II; and that the unit does not contain a minimum of ten employees required under RSA 273-A:8.

The undersigned hearing officer conducted a hearing on March 26, 2012 at the Public Employee Labor Relations Board (PELRB) 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' stipulations are incorporated in the Findings of Fact below.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:1, IX.
2. The Association is an employee organization seeking to be certified as the exclusive representative of a bargaining unit through a representation election pursuant to the provisions of RSA 273-A:10.
3. The proposed bargaining unit contains fourteen employees in the following five positions: Psychologist (5), Occupational Therapist (2), Occupational Therapy Assistant (1), Speech Language Pathologist (4), and Speech Language Pathology Assistant (2).¹ All members of the proposed bargaining unit are current employees of the District.
4. Two employees in the proposed bargaining unit, both Psychologists, are retiring at the end of the 2011-2012 school year. The School Board has not budgeted to replace these positions for the next school year.
5. Until recently, the District was a part of the SAU 38, which also covered other districts/municipalities. It withdrew from the SAU 38 and became the SAU 93 in March, 2011. The District covers several towns and is composed of several schools.
6. On September 14, 2010 the PELRB certified the SAU 38 Employees Association, NEA-NH as the exclusive representative of the following bargaining unit:

Speech and Hearing Pathologist, School Psychologist, Occupational Therapist, Special Education Coordinator, Special Education Teacher, Human Resources Coordinator, Vocational Coordinator, Director of Technology, Speech and Language Assistant, Certified Occupational Therapy Assistant, Receptionist, Payroll Coordinator, Manager of Purchasing and Accounts Payable, Purchasing and Accounts Payable Assistant, Assistant to Director of Student Services, Student Services Assistant, and Administrative Assistant to Superintendent.

¹ The position of Speech Language Pathology Assistant is also referred to in the record as Speech Language Assistant and Speech Language Therapy Assistant. The position of Occupational Therapy Assistant is also referred to in the record as Certified Occupational Therapy Assistant and Occupational Therapists Assistant. The position of Speech Language Pathologist is also referred to in the record as Speech Pathologist and Speech and Hearing Pathologist.

See Association Exhibit 6 (emphasis added).

7. All positions within the proposed bargaining unit at issue in this case were included in "SAU 38 Employee Association" bargaining unit approved and certified by the PELRB in September of 2010. See Association Exhibit 6.

8. The following terms and conditions of employment apply to full time and part time certified staff employed by the District, including Speech Language Pathologists, Psychologists, Occupational Therapists, and Occupational Therapy Assistants:

Working Conditions:

...

Works 188 days per calendar year for 5 days a week ...

Based on 35 hours per week 7.5 hrs per day, however contracted people are expected to attend meetings and before and after school events if needed.

2 Personal Days

5 Bereavement Days

13 Sick Days which can be accumulate [sic] to 120 days

Follows School calendar in District they are assigned for holidays and vacations. . . .

Staff Development:

In-district Staff Development days are included in the 188 days

3 additional professional days for conferences workshops [sic] outside the district (requires prior approval by the Director of Student Services) . . .

SAU will pay for recertification or licensure as long as it relates to the job that is held ...

Benefits:

Health insurance (the portion employee/employer split done in accordance with yearly SAU board determination [sic])

For those who are covered by other plan there is a \$2,500 buy back package at the end of the school year. (Proof of insurance is provided in June after the year is over)

Dental Insurance ...

Long term Disability

Life Insurance at no cost to the employee

NH State Teacher Retirement (you must work 80%) to be eligible [sic]

See Association Exhibit 1.

9. District's standard disciplinary procedure applies to all employees in the proposed bargaining unit.

10. All members of the proposed bargaining unit report to Troy Kennett, the Director of Student Services for the District, who in turn, reports to the Superintendent David Hodgdon. The Superintendent reports to the School Board.

11. All employees in the proposed bargaining unit attend monthly meetings with Mr. Kennett. The members of the proposed bargaining unit interact with the each other regularly and work together to resolve common problems and to advance the common goal of providing therapy services/treatment to students.

12. Beth Tom is employed by the District as a Speech Language Pathologist. She regularly attends monthly meetings with other employees in the proposed bargaining unit. She considers other Speech Language Pathologists, Occupational Therapists, Psychologists, Speech Language Pathology Assistants, and Occupational Therapy Assistants to be her colleagues.

13. Diane Harty is employed by the District as an Occupational Therapist. She regularly attends monthly meetings with other employees in the proposed bargaining unit. She considers other Occupational Therapists, Speech Language Pathologists, Psychologists, Speech Language Pathology Assistants, and Occupational Therapist Assistants to be her colleagues.

14. There is a self-felt community of interest among the employees in the proposed bargaining unit.

15. Occupational Therapists "apply the therapeutic use of purposeful and meaningful occupations or goal-directed activities to evaluate and threat individuals who have a disease or disorder, impairment, activity limitation, or participation restriction which interferes with ability to function independently in daily life roles, and to promote health and wellness." See Association Exhibit 4.

16. Occupational Therapy Assistants “[a]ssist Occupational Therapists in administering medically oriented occupational programs to assist in rehabilitating patients in hospitals and similar situations [and] [a]ssist in the evaluation of daily living skills and capacities of clients to determine extent of abilities and limitations.” See Association Exhibit 4.

17. Speech Language Pathologists “screen, evaluate, diagnose, treat and consult on disorders of communication. They identify, diagnose and treat individuals who have communications disorders [, including] disorders of speech, articulation, fluency, voice, verbal and written language, auditory comprehension, cognition communications and swallowing disorders.” See Association Exhibit 4.

18. Speech Language Pathology Assistants “[a]ssist speech-language pathologists in screening, evaluating, diagnosing, and treating disorders of communication [and] [a]ssist in identifying and treating individuals who have communication disorders. This may include disorders of speech, articulation, fluency, voice, verbal and written language, auditory comprehension, cognition communication and swallowing disorders. Speech Language assistants do not act independently, and must work under the direction and supervision of a licensed speech-language pathologist.” See Association Exhibit 4.

19. The Board of Medicine requires that Occupational Therapists provide clinical oversight to Occupational Therapy Assistants 5% of the working time regarding the implementation of education plans. Occupational Therapists and Occupational Therapy Assistants regularly meet and discuss what activities would be appropriate for each student and whether a student is ready for a particular activity.

20. The Occupational Therapists provide professional oversight of the Occupational Therapy Assistants in accordance with the norms of the Occupational Therapy Governing Board as provided in RSA 328-F and N.H. Administrative Rules Occ 100-500. An Occupational

Therapy Assistant's Allied Health license must be renewed every 2 years. An Occupational Therapy Assistant's application for a license renewal must be accompanied by a form completed by an Occupational Therapist.

21. Speech Language Pathologists provide professional oversight to the Speech Language Pathology Assistants for the purposes of the implementation of speech and language goals and objectives for the students.

22. The job descriptions currently used by the District are the SAU 38 job descriptions. See District Exhibit 2, pages 11-16. The District is in the process of developing new job descriptions for the SAU 93. The SAU 93 job descriptions are currently in a draft form and have not yet been finalized. New job descriptions must be approved by the School Board. See District Exhibit 2, pages 7-10.

23. According to the current job descriptions, Occupation Therapy Assistants and Speech Language Pathology Assistants report to the Director of Student Services. District Exhibit 2, pages 11 & 14.

24. After the Association filed the present petition for certification, the Director of Student Services distributed Specialist Assistance Evaluation Checklist to Speech Language Pathologists and Occupational Therapists and asked them to complete the checklists for Speech Language Pathology Assistants and Occupational Therapy Assistants, respectively. The Speech Language Pathologists and the Occupational Therapists had not completed any evaluation checklists for the Assistants prior to March 6, 2012. According to the Director of Student Services, the purpose of the checklists was to get better acquainted with the employees under his supervision. These checklists are not utilized to discipline, promote, demote, or fire Assistants. They do not affect Assistants' salary, pay raises, or benefits.

25. Occupational Therapists have no authority to, and do not, approve leave requests

for Occupational Therapy Assistants; and Speech Language Pathologists have no authority to, and do not, approve leave request for Speech Language Pathology Assistants.

26. Speech Language Pathologists, Occupational Therapists, and the Assistants cover several schools and at any time they work in the building where they are needed. Assistants' schedules are often set up by the Speech Language Pathologists and Occupational Therapists based on the need and time availability at a particular school. On some occasions, the Occupational Therapists and the Assistants prepare the schedules together. If there is a time conflict in a building, an Assistant can talk to a teacher involved and set up other time herself/himself without consulting a Speech Language Pathologist or Occupational Therapist.

27. Speech Language Pathologist Beth Tom is a member of the hiring committee. The Committee usually consists of two to four people. They meet to discuss candidates. Thereafter, they verbally report their observations to Mr. Kennett. Mr. Kennett makes hiring recommendations to Superintendent Hodgdon. The School Board has the final authority to make hiring decision and to approve the Superintendent's recommendations.

28. The Speech Language Pathologists and Occupational Therapists have no authority to, and do not, discipline, hire, demote, promote, suspend, or terminate other employees in the proposed bargaining unit; not do they have authority to recommend such actions.

29. Neither any employee in the proposed bargaining unit, nor the Director of Student Services decide which benefits employees will receive. Benefits are established by the Superintendent Hodgdon with the School Board's approval.

30. The District follows progressive discipline procedure, which includes verbal and written warnings that are placed in a personnel file. Only building Principals and the Director of Student Services have authority to issue, or to recommend the issuance of, a written warning to employees in the proposed bargaining unit.

31. The School Board has the final authority to hire, promote, demote, or terminate employees in the proposed bargaining unit.

32. The Director of Student Services and building Principals decide whether to grant vacation, sick, and other leave requests.

Decision and Order

Decision Summary

The Association has proposed an appropriate bargaining unit characterized by a sufficient community of interest within the meaning of RSA A:8, I and Pub 302.02. It is reasonable for the employees to negotiate jointly. This matter shall proceed to a representation election.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of a representation election pursuant to RSA 273-A:8, 273-A:10, and Pub 300.

Discussion

The District argues that the proposed bargaining unit improperly combines statutory supervisory employees (RSA 273-A:8, II) with the employees they supervise. According to the District, Occupational Therapists and Speech Language Pathologists are the statutory supervisors and Occupational Therapy Assistants and Speech Language Pathology Assistants, respectively, are the employees they supervise. The District also contends that the employees in the proposed bargaining unit lack a community of interest within the meaning of RSA 273-A:8, I.

RSA 273-A:8 vests the PELRB with the authority to determine the appropriate bargaining unit and certify the exclusive representative thereof. "Persons exercising 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. Statutory supervisory employees are

separated from the employees they supervise “to avoid conflicts between the two groups because of the differing duties and relationships which characterize each group.” *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999). See also *New England Police Benevolent Association, Inc., Local 50 et al. v. State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169; *New England Police Benevolent Association, IUPA, AFL-CIO v. Town of Hillsborough*; PELRB Decision No. 2010-112.

A supervisory relationship within the meaning of RSA 273-A:8, II exists “when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion.” *International Chemical Workers Union Council and Hillsborough County Nursing Home*, PELRB Decision No. 1999-079. In determining whether an employee exercises supervisory authority involving the significant exercise of discretion, important factors to consider include “the employee’s authority to evaluate other employees, the employee’s supervisory role, and the employee’s disciplinary authority.” *Appeal of Town of Stratham*, 144 N.H. at 432. See also *NEPBA, Inc. Local 40/NH Fish & Game Conservation Officers et al. v. SEA/SEIU Local 1984*, PELRB Decision No. 2006-174; *Teamsters Local/Plaistow Town Employees v. Town of Plaistow*, PELRB Decision No. 2010-062. A proper assessment of whether a position is supervisory “requires consideration of matters such as the nature, extent, character and quality of [employee’s] authority and involvement in the areas of discipline, evaluations, and hiring.” *Tilton Police Union, NEPBA Local 29 v. Town of Tilton*, PELRB Decision No. 2007-100. “[S]ome employees performing supervisory functions in accordance with professional norms will not be vested with the ‘supervisory authority involving the significant exercise of discretion’ described by RSA 273-A:8, II.” *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 611 (1993). See also *Hampstead Police Union, NEPBA Local 37 and Town of Hampstead*, PELRB Decision No. 2008-071.

In general, in considering the Districts objections, it must be noted that all the positions in the currently proposed bargaining unit were previously included in same SAU 38 bargaining unit, approved and certified by the PELRB in September of 2010. See Findings of Fact 6 & 7. In the present case, the evidence is insufficient to establish that Speech Language Pathologists and Occupational Therapists exercise “supervisory authority involving the significant exercise of discretion” over Speech Language Pathology Assistants and Occupational Therapy Assistants, respectively. Speech Language Pathologists and Occupational Therapists do not have authority to, and do not, hire, discipline, demote, promote, or terminate Speech Language Pathology Assistants and Occupational Therapy Assistants, respectively; nor do they have authority to recommend such actions. Although Speech Language Pathologists and Occupational Therapists have professional responsibility to provide clinical oversight to the Assistants in accordance to professional norms for 5% of the working time, this kind of oversight is not supervision within the meaning of RSA 273-A:8, II. It does not involve evaluation of employees for the purposes of discipline, promotion, demotion, pay increases, or termination but rather involves the supervision of students and their progress, and of the programs/therapies prescribed to each student.² Speech Language Pathologists and Occupational Therapists do not have authority to approve leave requests. The job descriptions for both Speech Language Pathology Assistants and Occupational Therapy Assistants demonstrate that their immediate supervisor is the Director of Student Services and not Speech Language Pathologists or Occupational Therapists.³

Further, the checklists, recently completed by the Speech Language Pathologists and Occupational Therapists, do not change the analysis of the statutory supervision issue for several

² “[S]ome employees performing supervisory functions *in accordance with professional norms will not be vested with the ‘supervisory authority involving the significant exercise of discretion’* described by RSA 273-A:8, II.” *Appeal of East Derry Fire Precinct*, 137 N.H. 607, 611 (1993) (emphasis added).

³ The drafts of new job descriptions for the positions of Speech Language Pathology Assistant and Occupational Therapy Assistant, see District Exhibit 2, pages 7-10, are not assigned significant weight as these drafts have not yet been approved by the School Board and have not yet been utilized.

reasons. First, the checklists have been created by the Director of Student Services and presented to the Speech Language Pathologists and Occupational Therapists after the filing of the present petition for certification. Second, the Speech Language Pathologists and Occupational Therapists have never previously completed checklists for the Assistants. Third, these checklists have no effect on the Assistants' compensation and benefits or on decisions to discipline, promote, demote, or terminate the Assistants. Furthermore, according to the Director of Student Services, the purpose of the checklists was to get better acquainted with the employees under his supervision.

In summary, the evidence shows that the relationship between the Speech Language Pathologists, Occupational Therapists, and their Assistants is that of colleagues and not of the supervisors and the supervised. Based on the record, Speech Language Pathologists and the Occupational Therapists are not persons "exercising supervisory authority involving the significant exercise of discretion" and the inclusion of Speech Language Pathologists and Occupational Therapists in the same bargaining unit with Speech Language Pathology Assistants and Occupational Therapy Assistants is unlikely to create a conflict within the bargaining unit.

The remaining issue is whether the employees in the proposed bargaining unit lack a community of interest required under RSA 273-A:8, I. "The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995) (quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)). RSA 273-A:8, I provides that

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 the same historic craft or profession;
- (d) Employees functioning within the same organizational unit.

(Emphasis added).

The PELRB rules provide additional criteria for determining whether a community of interest exists:

- (1) A common geographic location of the proposed unit;
- (2) The presence of:
 - a. Common work rules and personnel practices; and
 - b. Common salary and fringe benefit structures; and
- (3) The self-felt community of interest among employees.

Pub 302.02 (b). In addition to considering the principle of community of interest, the PELRB also takes into account the effect of forming any particular bargaining unit on the efficiency of government operations and the potential for employees within the proposed bargaining unit to experience a division of loyalties between the public employer and the employees' exclusive representative. See Pub 302.02 (c) (1) and (2).

"[T]he statutory framework which guides PELRB decisions is flexible, and gives much discretion to the PELRB's expertise. The statute and regulation require only that certain factors may be considered in determining whether a community of interest exists." *Appeal of University System of New Hampshire*, 131 N.H. 368, 374 (1988). Under the statute and regulations, "the PELRB need not find each criterion satisfied in order to find that a community of interest exists." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995).

In the present case, there is a sufficient community of interest between the members of the proposed bargaining unit. All currently proposed positions were previously within the same bargaining unit, approved and certified by the PELRB in September, 2010, when the District was still a part of the SAU 38, from which the existence of a history of collective negotiations can be reasonably inferred. See Association Exhibit 6: PELRB Certification and Order to Negotiate, issued September 14, 2010. The evidence otherwise shows the existence of the self-felt

community of interest among the employees in the proposed unit. Furthermore, the same disciplinary procedure and benefits framework applies to all employees in the proposed bargaining unit. The employees function within the same organizational unit and are in the same general professional category, that of providers of therapeutic services in educational setting. The members of the proposed unit interact with each other on regular basis and work together to advance educational goals of the District. Although the positions in the proposed unit require different educational qualifications, all members of the proposed unit are involved in therapy/treatment of students. Based on the record and the applicable standards, there is a sufficient community of interest so that it is reasonable for the members of the proposed bargaining unit to negotiate jointly.

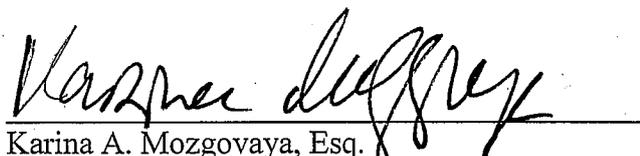
For the forgoing reasons, the composition of the bargaining unit proposed by the Association is approved. The approved bargaining unit contains fourteen employees and, therefore, satisfies the ten-employee minimum requirement of RSA 273-A:8, I. This is true even if the planned retirement of two employees is taken into account.

Accordingly, this case shall proceed to a representation election to determine the exclusive bargaining representative, if any, of the following bargaining unit:

Psychologist, Occupational Therapist, Occupational Therapy Assistant,
Speech Language Pathologist, Speech Language Pathology Assistant.

So ordered.

April 30, 2012


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

Distribution:
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