



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Mary Ellen Powell

v.

Keene School District
(John H. Fuller Elementary School)

Case No. E-0120-1
Decision No. 2012-175

Appearances:

Ellen Purcell, Esq., Purcell Law Office, PLLC, Dover, NH for the
Complainant

Margaret-Ann Moran, Esq., Upton & Hatfield, LLP, Hillsborough, NH
for the Respondent

James F. Allmendinger, Esq., NEA-New Hampshire, Concord, NH for
the Intervenor, Keene Education Association, NEA-NH

Background:

Mary Ellen Powell, an employee of the Keene School District, filed an unfair labor practice complaint on October 13, 2011 challenging the manner in which she is compensated. Ms. Powell claims that the District violated RSA 273-A:5, I (h)¹ by improperly refusing to recognize that, based on her duties and responsibilities, she is a "teacher" within the meaning of the existing bargaining unit certification and, therefore, should be compensated in accordance with the teacher's collective bargaining agreement (CBA). In her complaint, Ms. Powell requests that the PELRB order the District to make her position "teacher paid" to reflect duties and responsibilities she performs or change her role to conform to the existing job description for

¹ RSA 273-A:5, I (h) makes it "a prohibited practice for any public employer ... to breach a collective bargaining agreement."

instructional paraprofessional. Subsequent to the hearing, Ms. Powell filed a request for specific relief seeking the following relief: (1) that the District classify and employ her as a teacher, retroactive to the first day of the 2011-2012 school year, under New Hampshire Department of Education Rule 505.05(c); (2) that the Superintendent appoint a mentor certified in the same subject area she has been/will be teaching and initiate all other necessary and appropriate steps to establish a site-based certification plan, as set forth in Ed 505.05(d) (Alt 5 certification); (3) that the District compensate her for the difference between the salary she should have been earning as a teacher from the first day of the 2011-2012 school year and the salary she has earned to date while misclassified as a paraprofessional; and (4) that the District reimburse her for reasonable attorney's fees and expenses. See Powell Request for Specific Relief.

The District denies the claims and moves to dismiss, asserting, among other things, that the PELRB lacks jurisdiction over the complaint because Ms. Powell is not a certified teacher. The District objects to Ms. Powell's request for specific relief asserting, among other things, that the request is untimely and that the PELRB lacks jurisdiction to issue the relief sought.

The Keene Education Association, NEA-New Hampshire (KEA) filed a petition to intervene in support of Ms. Powell's claim on the ground that it is the exclusive representative of the teachers' bargaining unit at issue in this case. The KEA's request to intervene was granted at the pre-hearing conference. See PELRB Decision No. 2011-293.

The undersigned hearing officer conducted a hearing on February 9 and 27, 2012 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 KEA was originally certified by the PELRB as the exclusive representative of the bargaining unit described as follows: "In accordance with the Recognition clause, Article I in Agreement between the Keene Board of Education and the Keene Education Association July 1, 1975-June 30, 1978." See PELRB Recognition of an Exclusive Representative, Case No. T-0282, December 7, 1976.

3. This bargaining unit was last modified by the PELRB on January 28, 1985 and contains the following positions: "All full-time teachers, subject coordinators, librarians, guidance counselors and department heads, but excludes nurses, administrative and supervisory employees as defined in RSA 273-A:8, II and excludes all other employees." See PELRB Recognition of an Exclusive Representative, Case No. T-0282-A, January 28, 1985.

4. The District and the KEA are the parties to a CBA effective from July 1, 2011 to June 30, 2014. See Joint Exhibit 5.

5. Article 1.1 of the CBA, titled Recognition, provides in part as follows:

For the purposes of collective negotiations, the Board recognizes the Association as the exclusive representative of all teachers of the Keene School District as certified by the New Hampshire Public Employee Labor Relations Board. The term "teacher" shall include all full-time and part-time (80% or more in Keene) teachers, subject coordinators, librarians, guidance counselors, department heads, occupational therapists, and nurses, but excludes administrative and supervisory employees as defined in RSA 273-A:8, II and excludes all other employees.

See Joint Exhibit 5.

6. The parties' CBA contains a grievance procedure consisting of the following four steps: Building Principal, Assistant Superintendent, School Board, and binding arbitration. The CBA defines a "grievance" as a "claim based upon an event or condition which affects the welfare and/or terms and conditions of employment of a teacher or group of teachers based upon

the interpretation or application of any of the provisions of this Agreement, except such matters specifically excluded by this Agreement.” See Joint Exhibit 5, Article 11.

7. The District has a grievance procedure that covers employees not covered by collective bargaining agreements. This procedure contains the following steps: (1) Immediate Supervisor; (2) Building Principal; (3) Assistant Superintendent for Keene; (4) Superintendent; and (5) Board of Education. The Board’s determinations are final. Procedure defines a grievance as a “claim based upon an alleged violation of the terms and conditions of employment as specifically set forth in the policies of the Keene School District.” See District Exhibits 3 & 4.

8. Article 8.1 of the parties’ CBA, titled Teacher Employment, provides as follows:

The Board agrees to hire only those teachers who are certified by the New Hampshire State Department of Education for every regular teaching assignment, except this provision shall not apply in the instance where, in the opinion of the Superintendent, availability of personnel is critical and appropriate waiver is granted by the State Board of Education.

Article 8.1 is not expressly excluded from the contractual grievance procedure. See Joint Exhibit 5.

9. Article 9, titled Rates of Pay, and Appendices A-D set up the wage structure for the employees covered by the CBA. Article 9 and Appendices A-D are not expressly excluded from the contractual grievance procedure. See Joint Exhibit 5.

10. The job description provides that an Instructional Paraprofessional is “responsible for assisting teachers in providing individualized instruction to individual students or groups of students who are in need of special assistance” and that the paraprofessional’s immediate supervisor is the Principal or Assistant Principal and lists the following responsibilities:

1. Provides instructional services to children *under the direction of a teacher.*
2. Provides clerical and/or general duty support *under the direction of a teacher.*
3. Provides general supervision of students *under the direction of a teacher.*

4. Attends and participates in meetings and training as required by the district.
5. Assists in upholding and enforcing school rules, administrative regulations, and Board policy.
6. Performs related duties as assigned by the principal or assistant principal in accordance with district policies and practices.

See Joint Exhibit 2 (emphasis added.)

11. Under Administrative Rule Ed 504.05, titled Certification as a Paraeducator II, a paraeducator's qualifications include the following:

(7) As relating to supporting the classroom environment, the individual shall demonstrate the ability, *under the supervision of a professional*, to:

- a. Assist in maintaining a safe, health learning environment that includes following prescribed policy and procedures;
- b. Use strategies and techniques for facilitating the integration of individuals with exceptional learning needs into various settings;
- c. Prepare and organize material to support teaching and learning;..
- f. Use and adapt a variety of developmentally and age appropriate materials and equipment, including assistive technology, to support students' learning;..
- j. Carry out assessment activities to collect and document objective information about the students' strengths and needs;
- k. Assist with maintaining student records including using any technology employed by the district;...
- m. Support the instructional choices made for students.

See District Exhibit 8 (emphasis added).

12. The teacher position description set forth in the District's John H. Fuller Elementary School (Fuller) Handbook provides in part:

Qualification: As set by NH State Board of Education, Teacher Certification

Goal: To lead students toward the fulfillment of their potential for intellectual, emotional, and psychological growth and maturation.

Performance Responsibilities:

1. Provides instructions to students assigned to the teacher's class.
 - a. Provides full time supervision to students assigned to the teacher. . .

2. Develops and maintains a classroom environment conducive to effective learning within the limits of the resources provided by the district.
3. Prepares for classes assigned, and shows written evidence of (sic) preparation upon request of the immediate supervisor.
4. Encourages students to set and maintain high standards of classroom behavior.
5. Provides an effective program of instruction in accordance with the adopted curriculum and consistent with the physical limitation of the location provided and the need and capabilities of the individuals or student groups involved to include:
 - a. Review of preciously taught material
 - b. Presentation of new material
 - c. Use of a variety of teaching material and techniques.
6. Strives to implement by instruction and action, by one's own example, the district's philosophy of education and instructional goals and objectives.
7. Takes all necessary and reasonable precautions to protect students, equipment, materials, and facilities.
8. Maintains records as required by law, district policy, and administrative regulation.
9. Assists in upholding and enforcing school rules, administrative regulations, and Board policy.
10. Makes provision for being available to students and parents for education related purposes outside the instructional day when necessary and under reasonable terms.
11. Attends and participates in faculty and committee meetings.

See Powell Exhibit 12. Teachers' immediate supervisor is the school's Principal.

13. Administrative rule Ed 306.42 provides in part:

(a) The local school board shall require an integrated approach to the use of 21st century tools, including, but not limited to digital technology and communication tools, within all curriculum areas through the adoption of an information and communication technologies literacy (ICT) program in grades K-12 that provides opportunities at developmentally appropriate levels for students to:

...

(2) Become proficient in the use of 21st century tools to access, manage, integrate, evaluate, and create information within the context of the core subjects ...

...

(4) Use 21st century tools to develop technical proficiency at a foundation knowledge level in:

- a. Hardware;
- b. Software applications;

- c. Networks; and
- d. Elements of digital technology; and

(5) Create digital portfolios which:

- ...
- c. Include, at a minimum, such digital artifacts as:
 - 1. Standardized tests
 - 2. Observation;
 - 3. Student work; and
 - 4. Comments describing a student's reflection on his/her work.

Powell Exhibit 4.

14. Mary Ellen Powell is an employee of the District. In 2001-2002 she worked as a 5th grade substitute and long-term substitute teacher at the Fuller elementary school. In 2003 Ms. Powell was hired by the District as a paraprofessional.

15. In 2005 Ms. Powell began working as an instructional paraprofessional in the computer lab at the Fuller school. She currently holds a position of Instructional Paraeducator II and provides computer lab instruction to grades K through 5. All classes in Fuller school rotate through the lab.

16. Ms. Powell also holds a stipend position of Building Technology Integration Specialist at Fuller school under which she is required, among other things, to submit work orders to IT specialists, to update school website, to attend monthly technology meetings, and to provide technology training to the school staff. Ms. Powell serves on the committee responsible for developing the District's Technology Plan, on the Technology and Library Committee and on the Elementary Technology Integration Team.

17. Ms. Powell holds a State of Massachusetts teaching certificate in geography and general science grades 9-12. She received training in technology and regularly takes technology-related courses but does not hold a certificate or degree in technology. Ms. Powell does not hold

a State of New Hampshire teaching certificate or any alternative New Hampshire certificate, such as Alternative 5 certificate.

18. An Alternative 5 is a NH teaching certificate based on critical shortage of teachers. A person cannot apply for an Alternative 5 certificate until hired as a teacher by a school district. To obtain an alternative certification, a school must develop an alternative plan that must be approved by the State. The New Hampshire Department of Education critical shortage list for school year 2011-2012 includes the positions of Comprehensive Technology Education and Education Technology Integrator. See Powell Exhibit 3.

19. Ms. Powell is qualified to instruct computer lab classes at an elementary school level. In 2004, Ms. Powell received a Statement of Eligibility – Alternative 5 from the New Hampshire Department of Education establishing her eligibility for employment as a teacher in the area of elementary education. See Powell Exhibit 2.

20. Ms. Powell was involved in negotiations with the District as one of five representatives of the paraprofessionals' so called "meet and confer" group. This group is not a bargaining unit represented by a PELRB certified exclusive representative but it did negotiate terms and conditions of employment for paraprofessionals, including pay increases and benefits.

21. Salaries, benefits, and the evaluation process for paraprofessionals are different from those for teachers. Ms. Powell's salary as an instructional paraprofessional in 2011-12 school year was at least \$10,000 lower than a comparable teacher's salary.

22. There are five elementary schools in the District. The District utilizes different technology curriculum service delivery models for smaller schools and larger schools. Fuller and Symonds are larger schools. A proposed model for larger schools involves a media generalist overseeing a paraprofessional in the computer lab. At the Symonds school a media generalist does oversee the lab and a lab paraprofessional works under the direction of a media generalist.

This model is not utilized at the Fuller school partly because lab classes are often scheduled for the same time as other classes a media generalist is required to teach. In addition, unlike in the Symonds school, the computer lab and the media generalist's room are not in close proximity. In the Fuller school, the media generalist is not a member of the Elementary Technology Integration Team and has not been involved in computer lab class preparation or instruction. Similarly, the Fuller school teachers are not involved in developing computer lab/technology curriculum and are not trained to instruct computer lab classes. See District Exhibit 6.

23. Since becoming an instructional paraprofessional at the Fuller school computer lab, Ms. Powell has been planning and preparing computer lab lessons and lesson plans² herself, integrating lab lesson plans with grade level curriculum, preparing and proctoring computer lab tests, and instructing entire classes of students rather than individual students or small groups of students. At all relevant times, Ms. Powell has been working independently and not under the direction or supervision of other teachers or of the media generalist/librarian.

24. Ms. Powell's 2007-2010 evaluations, prepared by the Fuller school principals, state that she plans her own lessons, integrates the technology with the classroom curriculum, and teaches students. The evaluations also list her concerns that her responsibilities go beyond her job description.

25. In the April 2007 Evaluation Summary Principal Loren Wilder stated in part:

[Ms. Powell] schedules all classes to rotate through the lab during the six day cycle. Mary Ellen plans all her own lessons, integrating technology using the classroom curriculum as much as possible... She schedules grades 1-5 to come into the lab twice in the school year for this computerized assessment... [S]he uploads the appropriate test for each student and proctors every test session. Once the testing is complete, Mary

² For the purposes of this decision, a lesson plan is a skeletal outline of a lesson and a lesson is a detailed description of each class.

Ellen assists teachers and the school psychologist with reports, printing and interpreting them if necessary.

...

The students and staff at Fuller have greatly benefitted from Mrs. Powell's work in the computer lab this year. She continues to teach the students a wide variety of computer skills which integrate with their classroom curricula.

This year Mary Ellen developed a Web Quest for the fourth grade students... She is using Web Quest from the internet, but developed her own evaluation piece for the students.

... She has done a wonderful job with integrating technology skills with what is being taught in the classroom. Mary Ellen has shown initiative and continues to go far beyond what I could have hoped for when I transferred her to this position.

...

Mary Ellen is concerned about her job description. She feels that she is doing nearly all the job requirement of a special teacher, but is only getting paid as a paraprofessional. As I have stated before, I do not foresee the district supporting full time teachers in the computer labs in the near future, but I will continue to raise the concern as a part of the budget process.

See Powell Exhibit 1.

26. In the 2008 evaluation Principal Wilder stated in part:

... Mary Ellen plans all her own lessons integrating technology using the classroom curriculum as much as possible.

... This year she is part of the elementary Technology Integration Team. This team meets monthly to discuss issues, collaborate in integrating technology at the elementary leve (sic) and shares ideas and lesson plans.

... She continues to teach the students a wide variety of computer skills which integrate with their classroom curricula.

...

Mary Ellen has been developing lessons for the newest piece of equipment, a SmartBoard. She has attended workshops to learn the applications and is hoping to have several lessons for the primary grades by the end of the year as well as showing the staff how to use the new technology to enhance their lessons.

...

Mrs. Powell is concerned about her job description. She feels (and I agree) that she is doing nearly all the job requirement of a special teacher, but is only getting paid as a paraprofessional. This administrator is fully aware

of this and has raised this concern each budget cycle, even prior to appointing Mrs. Powell to her current position. Past practice within the elementary system has been for equity between the schools, so that a change such as this has not been possible in previous years. This administrator is continuing to work with the other elementary principals and the central office to allow her to trade in some tutor positions in order to make this a full teaching position. Some progress may have been made this budget cycle discussion in this regard.

Unfortunately, it is not within the capability of this administrator to accomplish this at a building level, without the complete support of the central administration, the other elementary principals and ultimately the school board. Efforts will continue to be made in this regard, especially with the possibility of a "pilot" program, perhaps in the two largest schools (Fuller and Symonds).

See Powell Exhibit 1.

27. In the 2009 evaluation Principal Wilder noted again that Ms. Powell prepares her own lab lessons and "continues to teach the students a wide variety of computer skills which integrate with their classroom curricula." 2009 evaluation also provides as follows:

... Mary Ellen developed a Technology Skills Checklist for grade (sic) K-3 with plans to extend to grades 4 & 5. She also developed a Computer Lab Skills note that is attached to each student project.

...

With all of the budget cuts, Mrs. Powell is, understandably, concerned about the future of her position. All I am able to do is to pass on to my successor the vital need for a school wide technology position at Fuller School and to stress the incredible job done by Mary Ellen in this position. I know that Fuller School is far ahead of the other schools in technology integration with the curriculum, and I credit Mary Ellen with taking on the lion's share of implementation.

See Powell Exhibit 1.

28. Ms. Powell expressed concerns regarding the lesson preparation and the lack of direction from teachers to Paul Huggins who became the Fuller School Principal in 2009.

29. In his September 2010 evaluation of Ms. Powell, Principal Huggins stated as follows:

Mary Ellen Powell works in the computer lab as a paraprofessional, performing duties that equate with those of a teacher. Her responsibilities include planning lessons, integration of technology into classroom

curriculum in all subject areas, coordinating and scheduling NWEA testing ... She also finds the time to work with students who require additional assistance regarding the development of reading skills.

...

Mrs. Powell performs her duties with appropriate skill and knowledge. Her performance would be improved if her position were upgraded to a teaching position, thereby enhancing her role in the school and allowing her to hold students more accountable for the mastery of information that she teaches in the computer lab.

...

Mrs. Powell has expressed concern with her job description. She is a para who in fact does the job of a teacher. She would like administrative support regarding the enhancement of her position.

30. In 2010 Mr. Huggins told Ms. Powell that the change of her position into a teaching position will be included in the school budget. He later explained to her that it was not done because there was no money in the budget.

31. Prior to 2011 students were accompanied to computer lab classes by a teacher whose responsibility was to provide assistance to Ms. Powell while she instructed students. Ms. Powell expressed concerns to the school administration that teachers who accompany students to lab classes do not assist students with assignments but, instead, grade papers for other classes, work on their lesson plans, email, and engage in other activities not related to the lab classes.

32. In mid-May, 2011 Principal Huggins informed Ms. Powell that teachers will no longer accompany students to lab classes. Teachers were pulled out of Ms. Powell's lab to attend Response to Intervention (RTI) meetings the purpose of which was to bring the staff/teachers together to discuss students' performance and teaching strategies. As the administration believed that RTI meetings must be conducted within teachers' working hours, Ms. Powell was left alone with students during lab classes with no one to assist her. When Ms. Powell expressed concern about being left alone with students during lab classes to Principal Huggins, he told her that she should work according to her job description.

33. Ms. Powell's Evaluation Summary prepared by Principal Huggins on May 31,

2011 provides in part:

Mary Ellen Powell is the instructional paraprofessional in Fuller's computer lab. In that position, Mrs. Powell meets with classes at each of the grade levels, once per week for 45-60 minutes. Grade level teachers currently remain with Mrs. Powell during their class computer time, but Mrs. Powell plans all lessons and integrates technology with the classroom curriculum in reading, math, social science, and related topic study.

... Mrs. Powell coordinates NWEA testing through the year with classroom teachers, the reading specialist, guidance, and the school principal... Mrs. Powell also provides NWEA reports to teachers, the school evaluator, and others as required.

Mrs. Powell is instrumental in the development implementation of student ICT portfolio information. Within that responsibility, students are taught to create and archive digital artifacts covering five content areas at each grade level. Mrs. Powell is the third grade liaison for the district ICT team.

...
Mrs. Powell fulfills responsibilities completely and she invests time and effort for beyond her job description as a paraprofessional. As a result of her efforts, technology instruction at Fuller is impressively comprehensive. Teachers and children at Fuller benefit greatly from Mrs. Powell's technological knowledge and from her energy and interest regarding all aspects of computer training.

...
Mrs. Powell continues to participate in professional development opportunities that will fulfill hour requirements for certification
Mrs. Powell creates meaningful projects for children that align with district and state curriculum requirements and standards
Attended workshops to further knowledge for using peripheral equipment and new applications...

See Joint Exhibit 4.

34. The May 31, 2011 evaluation listed the following concerns:

Mrs. Powell remains concerned that the instructional responsibilities in the computer room exceed her job description as a paraprofessional educator. The reality of her position is similar to that of a specials teacher. Among other concerns that emanate from this disparity, Mrs. Powell is not compensated at a level commensurate with her duties. She would like administration to recognize this situation and adjust both her compensation and professional status appropriately.

35. In September, 2011 Ms. Powell talked to Human Resources Director Paul Cooper about her concerns regarding teachers being pulled out of the lab classes and preparation of lab lessons and lesson plans. Mr. Cooper told her that she should not prepare lessons/lesson plans but did not explain who should be responsible for the preparation of lessons and lesson plans. Mr. Cooper discussed with Principal Huggins that a paraprofessional should not be writing lesson plans and Principal Huggins agreed to change the situation. According to Mr. Cooper, it is not a role of a paraprofessional to develop lessons/lesson plans. District co-Superintendent William Gurney also asked Principal Huggins to investigate the issues raised by Ms. Powell and alleviate the problem by making sure that she works according to her job description. Principal Huggins reported that additional support was needed to Ms. Powell under the existing model.

36. In early October, 2011 Ms. Powell met with Principal Huggins regarding filing of a complaint with the PELRB. She wanted to know what could be done to resolve lab instruction issues. Mr. Huggins encouraged her to file a complaint with the PELRB to push the administration to change a paraprofessional position into a teacher position.

37. Since October 2011 Principal Huggins has met with Ms. Powell on several occasions to discuss preparation of lessons/lesson plans. Principal Huggins did not discuss a detailed content of each lab lessons. He has been using a technology curriculum to determine what skills students should be taught for scheduled lab classes. Principal Huggins gives Ms. Powell suggestions for lab assignments from the technology curriculum. Ms. Powell continues to prepare detailed lab lessons and instruct entire classes of students without assistance from other teachers.

38. At the time Ms. Powell filed her complaint, she believed that she was not a member of the teachers' bargaining unit because she was not officially classified as a teacher.

39. Neither Ms. Powell nor KEA grieved the issue that a paraprofessional was doing a teacher's work or that Ms. Powell, while working as a teacher, was not compensated in accordance with the teachers' CBA. Ms. Powell has not utilized the District's grievance procedure covering non-bargaining unit employees.

40. Superintendent Gurney discussed the Fuller lab staffing concerns with KEA President Maureen Meyer without being able to resolve the issue. The October 5, 2011 letter from Ms. Meyer to Superintendent Gurney provides in part:

No teacher at Fuller has even planned the curriculum, no teacher has provided the instructional support activities, nor have they ever evaluated the students in the lab. Because Mary Ellen's position was not a prep time (the teachers were in the room) Fuller was able to *pretend* that the teacher was doing all of that. Instead, Mary Ellen, consummate professional that she is, was doing that.

For all of these years, Mary Ellen *should* have been paid as a teacher. But, she wasn't. Now, though, she is providing prep times and being asked to do duties just like a regular ed teacher. It is time to pay her for her efforts or return her to paraprofessional status. ...

Association Exhibit 1 (emphasis in original).

41. In October – December of 2011 Principal Huggins worked with Fuller school Media Generalist Patricia Heed in an attempt to resolve some of Ms. Powell's concerns, including lab lesson planning and direction/supervision during lab classes. These efforts have not been successful due, in part, to scheduling conflicts. See District Exhibit 6.

42. Ms. Powell is the only instructor at the Fuller school with sufficient knowledge, expertise, and experience to deliver technology curriculum to students.

43. On February 10, 2012 Principal Huggins sent the following email communication to Fuller school teachers:

. . . [P]lease plan to spend at least the first 15 minutes of computer room time with your class, beginning on the next day one February 14. This is

in addition to spending the entire class period in the computer lab when ICT artifact work is completed. . . . [Y]our presence in the lab is intended to enhance the connection between the computer skills that the children are learning and practicing in the lab, with curriculum work that you are accomplishing with the students in the general classroom. This does reduce the time that you have for Rti work, but at present, it is an arrangement that has become necessary...

See District Exhibit 9.

Decision and Order

Decision Summary:

Although classified as an “Instructional Paraprofessional,” Ms. Powell has been performing the duties and responsibilities of a teacher and is, therefore, covered by the bargaining unit certification and the teacher’s CBA. Because this decision establishes that Ms. Powell is covered by the CBA which contains a binding arbitration provision and because this dispute is within the scope of the CBA, the parties are directed to utilize the contractual grievance procedure to determine whether the District failed to compensate Ms. Powell in accordance with the CBA.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. However, the PELRB does not have jurisdiction to interpret a CBA when the CBA provides for binding arbitration. *See Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006). See Discussion section below.

Discussion:

The complainants claim that the District breached the CBA by failing to recognize that, based on her duties and responsibilities, Ms. Powell is a “teacher” and by failing to compensate her in accordance with the teachers’ CBA. The District moves to dismiss the complaint arguing that the PELRB lacks jurisdiction over this dispute because Ms. Powell is not a certified teacher

and, therefore, is not a bargaining unit employee.

“The PELRB has the exclusive authority to certify a bargaining unit... The composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB.” *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337, 340 (2012) (Citations and internal quotation marks omitted). Here, the original unit certification has been modified by the PELRB in 1985. The amended unit certification issued by the PELRB covers, among others, full-time teachers, subject coordinators, librarians, and guidance counselors employed by the District. Contrary to the District’s argument, the issue here is not whether a position of lab instructional paraprofessionals is covered by the certification and the CBA but whether Ms. Powell is an employee covered by the existing bargaining unit certification and the CBA.

The PELRB certification does not require that the teachers in the unit be certified by the New Hampshire Department of Education. The only term at issue here, therefore, is “teacher.” “‘Teacher’ has the following relevant meaning: one that teaches or instructs ... ; esp: one whose occupation is to instruct.” *Id.* at 341 (internal quotation marks omitted). Paraprofessional, on the other hand, is “a trained aide who assists a professional person (as a teacher or doctor) ...” See Merriam Webster’s Collegiate Dictionary 843 (10th ed. 1993).

In this case, the evidence shows that, although classified as an “Instructional Paraprofessional,” Ms. Powell has been performing duties and responsibilities of a teacher. As evidenced by evaluations prepared by the Fuller school administrators, Ms. Powell “in fact does the job of a teacher.” As stated by Principal Huggins in 2011 evaluation, “the reality of her position is similar to that of a specials teacher” and she “is not compensated at a level commensurate with her duties.” Ms. Powell teaches all students in the Fuller school, prepares computer lab lesson plans and detailed lessons, integrates computer lab classes with the

classroom curriculum, prepares and conducts required tests, and compiles test reports. She performs all these duties independently, without any direction or supervision from either teachers, or a media generalist, or the school administration.

The evidence also shows that Ms. Powell is the only instructor at the Fuller school with sufficient knowledge, expertise, and experience to deliver technology curriculum to students. Therefore, as no one else at the Fuller school is qualified to teach computer lab classes, the District's claims that Ms. Powell works under the direction or supervision of all teachers at the Fuller school and that it is unnecessary for a teacher to be physically present in the lab to provide direction or supervision to a paraprofessional lack credibility. Moreover, the evidence demonstrates that, although the administration has been aware since at least 2007 of Ms. Powell's situation and promised to make efforts to address her concerns, it did nothing to begin attempts to alleviate her concerns until after the filing of this complaint. Principal Huggins even suggested that a complaint to the PELRB might be necessary to resolve Ms. Powell's concerns.

For the foregoing reasons, I find that Ms. Powell is a teacher within the meaning of the PELRB bargaining unit certification and is, therefore, covered by the CBA. Accordingly, the District's motion to dismiss the complaint on the ground that Ms. Powell is not a certified teacher is denied.

The District also argues that the PELRB lacks jurisdiction because Ms. Powell failed to exhaust administrative remedies provided by the District to employees not covered by the CBA.³ Because I find that Ms. Powell is a teacher covered by the CBA (see above), the District's request to dismiss this complaint on the ground that Ms. Powell failed to exhaust the District's grievance procedure for non-bargaining unit employees is denied. The District's argument that Ms. Powell is estopped from bringing this claim because she has previously accepted a

³ The District denies that Ms. Powell had a right at any time to file a grievance under the CBA.

paraprofessional's employment contract fails for a number of reasons, including the fact that Ms. Powell raised her concerns regarding her position for several years and have been promised by the District's administrators that her concerns will be addressed.

The undersigned agrees with the District that the PELRB does not have jurisdiction to order the District to hire Ms. Powell as a teacher or appoint a mentor and initiate all other necessary steps to establish a certification plan for Ms. Powell. Accordingly, these requests for relief are denied with the observation that if the District wishes to utilize Ms. Powell as a teacher, it must compensate her as a teacher, comply with the applicable provisions of the CBA, and follow the relevant New Hampshire Department of Education laws and rules.

The determination of whether the District failed to compensate Ms. Powell in accordance with the terms of the CBA for the 2011-2012 school year (see Ms. Powell's Request for Specific Relief) and, if it did, the relief available to Ms. Powell necessarily involves interpretation of the terms of the CBA. "While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration." *Appeal of the City of Manchester*, supra, 153 N.H. at 293 (citations omitted). The PELRB, however, is "empowered to interpret a CBA, as a threshold matter, to determine whether a specific dispute falls within the scope of the CBA [a]bsent specific language to the contrary in the CBA." *Appeal of Michael Silvertein*, 163 N.H. 192, 197 (2012) (internal quotation marks omitted.) Furthermore, "[a] presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

In the present case, the CBA contains a grievance procedure, which culminates in binding arbitration. Further, this dispute involves a CBA provision covering wages (Article 9). This provision is not expressly excluded from the grievance procedure. The record in this case shows that it cannot be determined with "positive assurance" that the CBA is not susceptible of an interpretation that covers this dispute. Therefore, the issue of whether the District failed to compensate Ms. Powell in accordance with the terms of the CBA is arbitrable and is covered by the contractual grievance procedure.

Accordingly, Ms. Powell is directed to utilize the CBA grievance procedure to seek resolution of her breach of the CBA claim.

So ordered.

July 23, 2012


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