



State of New Hampshire
Public Employee Labor Relations Board

Keene State College Directors and Supervisors Association, NEA-NH

and

Keene State College

Case No. E-0191-4

Decision No. 2021-171

Appearances:

Rachel Hawkinson, UniServ Director, NEA-NH, Concord, NH, for the Keene State College Directors and Supervisors Association, NEA-NH

Karyl Roberts Martin, Esq., Associate General Counsel, University System of New Hampshire, Concord, NH, for the Keene State College

Background:

On May 13, 2021, the Keene State College Directors and Supervisors Association, NEA-NH (Association) filed a modification petition pursuant to N.H. Admin. R. Pub 302.05 seeking to add a newly-created position of Accreditation and Assessment Officer to the existing Keene State College (KSC) Directors and Supervisors bargaining unit set forth in PELRB Decision No. 2016-290 (December 13, 2016).

The KSC objects to the modification petition on the ground that the Accreditation and Assessment Officer position is confidential within the meaning of RSA 273-A:1, IX (c). The KSC requests that the PELRB deny the petition.

A hearing was held on June 24, 2021. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. Both parties filed

post-hearing briefs on July 16, 2021. The parties' Agreed Statement of Uncontested Facts is incorporated into the Findings of Fact below and the decision is as follows.

Findings of Fact

1. The KSC is a member institution of the University System of New Hampshire and a public employer within the meaning of RSA 273-A:1, X.
2. The Association is the certified exclusive representative of the KSC Directors and Supervisors bargaining unit. See PELRB Decision No. 2016-290 (December 13, 2016).¹
3. In addition to the Directors and Supervisors bargaining unit, the KSC has the following bargaining units: (1) a full time faculty unit represented by the Keene State College Education Association, NEA-NH; (2) an adjunct faculty unit represented by the Keene State College Adjunct Association, NEA-NH; (3) a campus safety personnel unit represented by the Teamsters Local 633; (4) administrative/operating staff employees bargaining unit represented by Keene State College Administrative Staff Association, NEA-NH; and (5) the professional and technical employees bargaining unit represented by Keene State College Staff Association, NEA-NH.
4. The Association and KSC are parties to the 2020-2021 collective bargaining agreement, which provides as follows in the Recognition clause, Article 1.B.2:

In the event new USNH personnel classification(s) are to be added to the work force, the College shall notify the Association of such new classification(s) within sixty (60) calendar days of its creation. The College shall determine if such new classification(s) shall be added to this bargaining unit and the College shall notify the Association of its determination. If the Association disagrees with the College's determination, the matter may be referred to the PELRB by the Association with a request that the PELRB make a determination. In the event it shall be finally adjudicated that the new classification(s) be added to the bargaining unit, the classification(s) shall then be subject to the provisions of this agreement.

¹ PELRB Decision No. 2016-290, including the list of bargaining unit positions, is incorporated by reference into these Findings of Fact.

See Association Exhibit D.

5. The New England Commission of Higher Education (NECHE) provides regional accreditation to New England institutions providing higher education. Without regional accreditation, an institution, such as KSC, cannot qualify for financial aid/assistance.

6. In the recent years, the accreditation and assessment processes at the KSC have been disrupted, in part, due to high turnover.

7. A recent accreditation review by the NECHE recommended increased focus on assessment of academic programs and student outcomes by the KSC. See JPHW Agreed Statement of Uncontested Facts. See also Joint Exhibit 6 (incorporated by reference).

8. According to the KSC President, a new "leadership" position was necessary in order to make assessment processes uniform.

9. The new position of Accreditation and Assessment Officer (AAO) was created based on NECHE's recommendations and in order to help reestablish the culture of assessment.

10. The AAO position description describes the AAO's role, in part, as follows: "[T]his position will develop institutional strategy, structure, and process for proactively anticipating and addressing Keene State College's needs around compliance, accreditation, and certification at the Federal, state, and agency levels." See JPHW Agreed Statement of Uncontested Facts.

11. This position is classified by the University System as an Administrative Services Specialist. See JPHW Agreed Statement of Uncontested Facts.

12. The posting for the AAO position provides that the position's department is KSC VP Academic Affairs-Admin. The posting provides the following position summary:

Keene State College invites applications for an Accreditation and Assessment Officer (AAO) to serve the entire institution with a priority focus on Academic programs. This position serves as the advisor to the President and institutional liaison with NECHE and provides support for accredited academic programs.

Reporting to the Provost this position will develop institutional strategy, structure, and process for proactively anticipating and addressing Keene State College's needs around compliance, accreditation, and certification at the Federal, state, and agency levels. This position will help advance assessment activity for the institution, but also has primary responsibility for assessment initiatives with a priority focus on academic programs, and has supervisory responsibilities for the Assessment Analyst within the department of academic program assessment.

This position's duties, as it relates to the Provost & VP of Academic Affairs, President, Cabinet and Deans must maintain a high level of confidentiality and advising of program change needs as the position is integral in formulating, determining and effectuating management policies that may impact labor or personnel relations.

Joint Exhibit 1.

13. The posting for AAO position includes the following description of duties and responsibilities:

- Serve as institutional liaison with NECHE and coordinating the institutional response for review, self-study, and interim reports.
- Maintain knowledge of all NECHE standards and requirements, keeping the President and Provost informed of key changes.
- Communicate with NECHE regarding substantive changes in academic portfolio, program delivery, or institutional leadership.
- Coordinate the institution's self-study and or response documents to NECHE accreditation. Assuring accreditation and related materials are accessible, public, and archived.
- Maintain projection action inventory and engage with institutional leadership to ensure timely attention and/or progress to all items.
- Work with Institutional Research, academic programs, and campus departments to ensure assessment data collection and availability in support of NECHE accreditation.
- Provide Logistical and administrative support for Accredited Academic [curricular] programs (currently Music, Education, Dietetics, and Chemistry).
- Work with Institutional Research and programs to insure data collection in support of accreditation.
- Responsible for the supervision of the Assessment Analyst within the department of academic program assessment.

- Maintain information of all institutional and program accreditation, accredited status, reporting requirements.
- Provide information on accredited programs as requested by Board of Trustees and Educational Excellence Council.
- Responsible for implementing a program to address all risk factors as they relate to compliance and intuitional [sic] effectiveness. And through the collection and interpretation of appropriate data, inform the President and Cabinet in ways that promote effective decision making and successful outcomes.
- Assist in developing and overseeing the college assessment of student learning, in collaboration with the divisional deans and Vice President for Academic Affairs, the institutional effectiveness committee and individual academic departments and programs.
- Provide consultation to faculty and staff regarding assessment, assessment strategies, and program review of non-accredited programs. Support departments in the development of tools, data collection, rubrics, and surveys for assessment needs.
- Coordinate annual academic department assessment.
- Contribute to long-term strategic planning related to college assessment initiatives.
- Develop comprehensive plan to collect and interpret data that informs institutional decision making and responds to all external reporting agencies requiring institutional data.
- Work with College Wide Learning Outcome (CWLO) Steering Committee to develop long-range plan for assessing College-wide learning outcomes. May provide direct leadership for one or more CWLOs.
- Support to ISP² Council on assessment of ISP and its courses and in relation to CWLOs.
- Provide administrative coordination of Assessment Grants process (related to/complying with KSCEA CBA)
- Coordination of cyclical program review of academic programs.
- Collaborate with program review teams and writers to engage in the self-study, assessment, and site visit process.
- Maintain action plan item inventory and engage deans and provost to ensure timely attention and /or progress to all items.

Joint Exhibit 1. There have been at least two previous versions of the AAO position description that differ from the final version set forth here. See Association Exhibits A & B. According to the KSC President, in the process of developing a new position job description, the administration commonly goes through many different drafts of a job description before arriving at a final version.

14. The AAO will advise the KSC President on the issues related to the institutional

² ISP means Integrated Study Program. See Joint Exhibit 6.

accreditation and assessment. According to the President, the AAO will also help lead development of the faculty and work with the administrative staff and the faculty to help them understand why some courses don't meet college expectations and goals and, therefore, might have to be eliminated.

15. The AAO's duties related to the assessment of student learning outcomes is about whether students learned what they were supposed to learn and is not related to program elimination.

16. As part of the assessment duties, the AAO will review students' evaluations of faculty and reports and complaints concerning employees.

17. The AAO will assist in KSC budget development, including in development of "the institutional scope of investment," which is not open to the public. The KSC final budget is a public document.

18. According to the KSC President, the AAO will have access to personnel files and will advise the President on negotiations with the unions.

19. The AAO does not evaluate employee performance for any employees in the Directors & Supervisors bargaining unit.

20. Performance of faculty and staff is evaluated according to the procedures and criteria set forth in their respective collective bargaining agreements. See JPHW Agreed Statement of Uncontested Facts.

21. The KSC has a Program Elimination Guidelines Task Force which includes representatives of administration, faculty, and unions. The Task Force is charged with reporting to the Senate Executive Committee and "with developing guidelines appropriate for the rapidly

changing landscape of higher education." The guidelines "should consist of measurable assessment data and metrics. See Joint Exhibit 5. The Senate's recommendations are advisory.

22. Undergraduate academic programs are reviewed for viability and probationary status in accordance with the Undergraduate Program Viability Review Process approved by the College Senate in March, 2021, using the Program Assessment Template and Program Review Guide. Position elimination and retrenchment for both faculty and staff are governed by their respective collective bargaining agreements.

Decision and Order

Decision Summary

The Accreditation and Assessment Officer is a confidential employee within the meaning of RSA 273-A:1, IX (c). Accordingly, the Association's request to include this position in the Directors & Supervisors bargaining unit is denied at this time.

Jurisdiction

The PELRB has jurisdiction to determine the appropriate bargaining units pursuant to RSA 273-A:8 and Pub 302.

Discussion

RSA 273-A:8, I vests the PELRB with the authority to determine the appropriate bargaining unit and certify the exclusive representative thereof. In this case, the Association seeks to add the position of the Accreditation and Assessment Officer to the existing Directors & Supervisors bargaining unit. KSC objects to the modification on the grounds that this position is confidential within the meaning of RSA 273-A:1, IX (c)³.

³Although some of the parties stipulations and Findings of Fact indicate that the AAO position has supervisory responsibilities over the Assessment Analyst, this decision does not address whether the AAO is a statutory supervisor for the following reasons: (1) the KSC does not argue that the AAO is a supervisory employee within the

RSA 273-A:1, IX (c) defines "public employee" as "any person employed by a public employer except ... [p]ersons whose duties imply a confidential relationship to the public employer." However,

Confidential employees, in terms of a labor relations statute, are not those who merely deal with sensitive material or confidential matters, such as tax returns, 'state secrets', financial or personal matters which might be deemed 'confidential' in the sense that they should not be divulged to the general public. Indeed, most state employees (teachers, policemen, and others) have access to and are familiar with 'confidential' information and the drafters of the statute could not have intended that they be excluded from bargaining units.

State of New Hampshire, Department of Revenue Administration v. State Employees' Association, PELRB Decision No. 78001. Rather, confidential employees are "those employees who have access to confidential information *with respect to labor relations, negotiations, significant personnel decisions and the like.*" *Appeal of Town of Moultonborough*, 164 N.H. 257, 262 (2012) (emphasis added). Furthermore,

[T]he number of such employees in any department or other unit of government must be large enough to enable the labor relations activities of the Department and the personnel activities of the Department to be carried on, but must not be so numerous as to deny employee who are entitled to the rights and benefits of R.S.A. 273-A those rights merely on the assertion that they might somehow be connected with activities related to labor relations.

Supra, PELRB Decision No. 78001. "There is no set minimum or maximum number of employees who may be deemed confidential." *Appeal of City of Laconia*, 135 N.H. 421, 424 (1992).

In *Appeal of City of Laconia*, the Supreme Court concluded that the administrative secretary was a confidential employee because she "was privy to the personnel director's personal thoughts, strategies, and notes about the collective bargaining process. Moreover, the

meaning of RSA 273-A:8, II; and (2) the Assessment Analyst position is not in the Directors & Supervisors bargaining unit at issue in this case and therefore would not be in the same bargaining unit with the AAO.

administrative secretary opened all inter-departmental communications, including those involving labor negotiation strategies between the city manager and the personnel director.” *Appeal of City of Laconia*, supra, 135 N.H. at 423. See also *Appeal of Town of Newport*, 140 N.H. 343, 354 (1995). Similarly, in *Hooksett Police Supervisors, NEPBA Local 38 and Town of Hooksett*, the executive secretary was excluded from the proposed bargaining unit because she maintained all personnel files and performance evaluations, took and typed the minutes of the Police Commission’s meetings, both public and non-public, typed the Chief’s letters, including budgetary and labor related letters, and was privy to the Chief’s ideas regarding collective bargaining negotiations with the exclusive representative of an existing bargaining unit. See PELRB Decision No. 2010-182 (October 11, 2010).

Further, in *New Hampshire State Police Command Staff/New Hampshire Troopers Association and State of New Hampshire, Department of Safety, Division of State Police*, PELRB Decision No. 2021-123 (June 15, 2015), the Board found that an executive major was a statutory confidential employee based on the testimony of the Director of State Police that he planned to have the executive major play an active role in the bargaining process, despite the finding that the executive major had not been previously involved in collective bargaining. The Board stated in part:

It is true that the history of the Executive Major position during the time period prior to 2010... does not include active involvement in labor negotiations, either through direct negotiations on behalf of the State or indirectly through support of the State bargaining team. However, this history is one factor to consider which must be balanced and considered in the context of other relevant evidence. It is not a determinative factor and should not be given undue weight ... Colonel Quinn's ... judgement and conclusions about how Executive Major Parenteau, if designated as a confidential, non-bargaining unit employee, will provide needed support in labor relations in general, and in the areas of personnel management and negotiations in particular, must be taken into account.

See *id.* The Board found, among other things, that having the executive major as "an additional resource within the ranks of sworn personnel would be a valuable and substantive improvement and addition to the State's ability to evaluate proposals, prepare appropriate responses, and otherwise generally engage in the negotiation process." *Id.*

In contrast, in *University System of New Hampshire v. State of New Hampshire, et al.*, 117 N.H. 96, 101 (1977), the Supreme Court agreed with the PELRB that department chairs were not confidential employees stating as follows:

The evidence showed that access to personnel files is not limited to department chairmen, but extends to members of the department's promotion and tenure committee. Such access would not alone require a finding that the department chairmen are confidential employees... Recommendations to the administration by department chairmen regarding promotions and tenure are made after discussions with other members of the department. This does not constitute confidential interaction between department chairmen and the administration on labor relations matters. The PELRB's determination that department chairmen are not confidential employees is neither unreasonable nor unlawful.

Id. at 101-102. Likewise, in *State Employees' Association of New Hampshire, SEIU Local 1984 v. Plymouth State University*, PELRB Decision No. 2013-133 (August 2, 2013), Department Chairs were included in the bargaining unit over the objection that they were confidential employees despite the finding that they had access to personnel files and played a role in personnel matters like hiring, promotions, tenure, because the Department Chairs' responsibilities were not linked to labor relations matters in any meaningful way. See also *Certain Classified Employees of the Public Utilities Commission v. SEA of NH, Inc., Local 1984, SEIU*, PELRB Decision No. 2008-096 (April 17, 2008)(finding evidence insufficient to establish necessary link confidential relationship must bear upon labor relations as senior policy advisor position was based on specialized knowledge and experience and was not involved in development of labor or personnel policy).

Furthermore, in *Keene State College Directors and Supervisors Association, NEA-NH and Keene State College*, PELRB Decision No. 2016-115, the KSC objected to the inclusion of the Director of Institutional Research and Assessment position in the Directors & Supervisors bargaining unit. In that case, the Director of Institutional Research and Assessment, among other things, produced reports, surveys, and other data that were utilized by the KSC management in making personnel decisions or in collective bargaining and KSC administration relied on the Director's expertise in making personnel, budgetary or labor-related decisions. See *id.* However, the KSC's objection to the inclusion of this position was overruled because (1) the Director's interactions with the College management were based on her specialized expertise in collecting data, producing statistical reports, and conducting and analyzing surveys, and does not involve significant personnel decisions or collective bargaining; (2) the Director had no access to individual personnel files or disciplinary and other employee-related documentation and was not privy to the KSC management's thoughts concerning negotiations, labor relations or significant personnel decisions; (3) most of the data reports the Director produced were either widely disseminated within the KSC or available to the public; (4) the Director did not participate in personnel or labor-related decision-making and was not made aware of the personnel or labor-related decisions or strategies. See *id.*

In this case, the record shows that the Accreditation and Assessment Officer is a confidential employee within the meaning of RSA 273-A:1, IX (c). Although, like the executive major in State Police Command Staff, the AAO has not yet been involved in labor negotiations as part of the management team, based on the KSC President's testimony and the job description, the AAO will be involved in negotiations and will advise the President. See Joint Exhibit 1. Furthermore, the job description provides that the AAO "as it relates to the Provost & VP of

Academic Affairs, President, Cabinet and Deans must maintain a high level of confidentiality and advising of program change needs as the position is integral in formulating, determining and effectuating management policies that may impact labor or personnel relations." See Joint Exhibit 1. In addition, like secretaries in *Laconia* and *Hooksett*, the AAO has access to personnel files as well as disaggregated (i.e. identified by individual) information regarding complaints, students' evaluations, and reports concerning bargaining unit members. The AAO is also expected to advise the KSC President and the Provost on matters of institutional policy, assessment, accreditation, budget preparation, and program elimination, which can ultimately affect the employment of bargaining unit members.

Based on the foregoing, the AAO will be involved in confidential personnel or labor negotiations related matters, and therefore, is a "person whose duties imply a confidential relationship to the public employer" within the meaning of RSA 273-A:1, IX (c).⁴ Accordingly, the Association's request to add Accreditation and Assessment Officer to the Directors and Supervisors bargaining unit is denied and the modification petition is dismissed.

So ordered.

Date: 10/5/2021


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⁴Notwithstanding the foregoing, nothing in this decision prevents the Association from availing itself of Admin. Rule Pub 302.05 in the future to seek the inclusion of this position in the bargaining unit if and when new facts develop to show that this position is not, in actuality, involved in any meaningful way in, or has access to information with respect to, labor relations, negotiations, and/or significant personnel decision.