



State of New Hampshire
Public Employee Labor Relations Board

Wakefield Paraprofessionals' Union/NEA-NH

v.

Wakefield School District

Case No. E-0062-6
Decision No. 2022-083

Order

Appearances:

Peter Miller, UniServ Director, NEA-New Hampshire, Concord, NH for the Wakefield Paraprofessionals' Union/NEA-NH

Matthew H. Upton, Esq., Drummond Woodsum & MacMahon, P.A., Manchester, NH for the Wakefield School District

Background:

On November 19, 2021, the Wakefield Paraprofessionals' Union/NEA-NH (Union) filed an unfair labor practice complaint under the Public Employee Labor Relations Act against the Wakefield School District (District). The Union alleges as follows: (1) the District created a Behavioral Interventionist position and appointed a bargaining unit employee to this position without posting the position and "without the knowledge or involvement of the Union"; (2) the Behavioral Interventionist position has the same duties and responsibilities as the positions currently in the bargaining unit; (3) the District unilaterally assigned a wage rate to this position outside the wage schedule set forth in the collective bargaining agreement (CBA); and (4) by its actions, the District breached Article 10.2 of the CBA, which requires it to notify the Union president and post a notice of a vacancy for a bargaining unit position, and breached its duty to negotiate in good faith over the position's wages, in violation RSA 273-A:5, I (h) and (e),

respectively. The Union also argues that "subcontracting bargaining unit work to a non-bargaining unit position" is an unfair labor practice in violation of RSA 273-A, I (a), (e), and (g); and that "excluding the union from discussion and decision making about a position performing bargaining unit work" violates RSA 273-A:5, I (a), (e), (g), and (i). The Union requests that the PELRB order the District (1) to cease and desist from violating the CBA; (2) to pay the Behavioral Interventionist according to the negotiated wage schedule; (3) to negotiate any changes to the terms and conditions of employment; (4) to post the position according to Article 10.2 of the CBA; (5) to vacate the position of Behavioral Interventionist until this dispute is resolved; and (6) make the Union whole.

The District denies the charges and asserts that the Behavioral Interventionist position is a newly-created non-unit position with duties and responsibilities that differ significantly from those of bargaining unit employees; and that the District has no obligation to follow the requirements of CBA Article 10.2 or otherwise notify or involve the Union in the hiring of an employee into a non-unit position. The District also alleges that if the Union wished to petition the PELRB for inclusion of this position in the existing bargaining unit, the District would likely consent and, if included, the District would then bargain with the Union over the position's terms and conditions of employment. The District requests that the PELRB find that the District did not commit an unfair labor practice and deny the Union's requested relief.

The parties agreed to submit this case for decision on stipulated facts, affidavits¹, exhibits and briefs. After several continuances, the parties completed their submission on March 25, 2022, without submitting a statement of stipulated facts, relying instead on the facts alleged in the Union's charge and admitted in the District's answer. The decision is as follows.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:I, X.

¹ The parties submitted witness statements in lieu of affidavits.

2. The Union is the certified exclusive representative for the following bargaining unit: Paraprofessionals and Speech Assistants. See PELRB Decision No. 2013-004 (January 2, 2013). Some of the paraprofessionals are certified as Paraeducator I, some as Paraeducator II, and some are uncertified.

3. The most recent collective bargaining agreement (CBA) between the Union and the District was in effect from July 1, 2019 to June 30, 2021. The parties are currently in "status quo."

4. Article 1 of the CBA, titled Recognition, provides as follows:

1.1 The Wakefield School Board recognizes the Wakefield Paraprofessionals' Union, NEA-New Hampshire for purposes of collective negotiations according to RSA-273A, as the exclusive representative of all paraprofessionals, applied behavior analysis (ABA) tutors, licensed nurse assistants (LNAs), and speech assistants employed by the Wakefield School District.

See District Exhibit H.

5. Article 2 of the CBA, titled Management Right, provides as follows:

2.1 The school board, subject only to the express language of this agreement, reserves to itself full jurisdiction and authority over matters of policy and retains the unrestricted right (a) to direct and manage all activities of the school district; (b) to direct the work of employees; (c) to hire, promote, transfer, assign and retain employees in positions within the school district, to non-renew employees, and to suspend, demote, discharge, withhold wage increases, or take any other disciplinary action against the employees; (d) to act unilaterally, including by adoption or rule or regulation, on any and all matters not excluded by RSA 273-A, provided said act, rule or regulation does not conflict with or violate any of the expressed terms of this agreement; (e) to maintain the efficiency of government operations; (f) to relieve employees from duties because of lack of work or for other reasons; (g) to determine the methods, means and personnel by which operations are conducted; (h) to contract with companies or agencies for services to be provided by employees of those companies or agencies, including services that otherwise might be performed by bargaining unit employees; and (i) to take actions as may be necessary to carry out the mission of the district in emergencies.

See District Exhibit H.

6. Article 10.2 of the CBA provides as follows:

Whenever a vacancy *for a bargaining unit position* becomes available, the superintendent or designee shall notify the union president via email and by posting a notice in the mail room in each building. Such notices shall contain the date of posting,

a description of the position, work location(s), requirements of the position, name of the person to which the application is to be returned and date by which the application is to be returned.

See Union Exhibit 1 (emphasis added).

7. Article XIV of the CBA, titled Grievance Procedure, provides in part at follows:

14.1 A "grievance" shall mean a complaint by a member of the bargaining unit that there has been a violation of this contract, except that the following shall be excluded from the grievance procedure: (1) any bylaw of the school board pertaining to its internal organization, (2) any matter which, according to law, is either beyond the scope of school board authority or is limited to unilateral action by the school board alone, and (3) any matter which this agreement stated shall not be subject to the grievance process.

See Union Exhibit 1. The last step of the four-step grievance procedure is a binding arbitration.

8. The CBA contains a bargaining unit employees' salary schedule and employee step placement schedule, and covers hours of work and benefits, such as health insurance and dental plans, among other things. See Union Exhibit 1.

9. In July of 2021, the District's administrative team, including Principal Kristen White, began discussing a creation of a Behavioral Interventionist position to help address the social and emotional impact the coronavirus had on the District's students. See White Statement. The administration decided to utilize "ESSER 3" grant² funds to create the Behavioral Interventionist position.

10. Meghan DeColfmacker was hired by the District in the summer of 2021 as a "regular education paraprofessional," a bargaining unit position. She was placed on step 1 of the step schedule as an uncertified paraprofessional. Ms. DeColfmacker had previous experience in managing a behavior intervention program in another district and was certified in Crisis Prevention Intervention. See White Statement.

² Elementary and Secondary School Emergency Relief Fund. It was established as part of the Education Stabilization Fund in the CARES Act to address the impact of COVID-19 on elementary and secondary schools across the country. See <https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf>.

11. In October, 2021, the District created the Behavioral Interventionist position and hired Meghan DeColfmacker into this position.

12. On October 24, 2021, District Superintendent Pamela Stiles sent an email message to all staff which included the following statement:

Starting Monday October 25, Meghan DeColfmacker has accepted the position as "Behavioral Interventionist." A new "Student Success Center" will provide a place for students to de-escalate, process through problems and strengthen strategies that will allow them to be successful in class. Meghan is going to take the week to get organized and will begin welcoming students on Monday, November 1. She will be forthcoming with details this week.

See Union Exhibit 2.

13. Behavioral Interventionist is a new position.

14. The District did not negotiate with or notify the Union regarding its decision to create the Behavioral Interventionist position or to appoint Ms. DeColfmacker to this position.

15. Under the CBA, pay rates for uncertified paraprofessionals range from \$12.63 to \$17.96 per hour. See Union Exhibit 1. Prior to being appointed to the Behavioral Interventionist position, Ms. DeColfmacker was a bargaining unit employee working as an uncertified paraprofessional. Her rate of pay was \$13.38 per hour.

16. The pay rate for the Behavioral Interventionist is \$23.00 per hour. See District Exhibit F.

17. On October 28, 2021, the Union requested information related to the Behavioral Interventionist position, including rate of pay, work hours, benefits, job description, employment agreement, and notes and correspondence related to the creation of the position. See Union Exhibit 3. The Union also objected to the District's unilateral creation of this position stating in part as follows:

The employer violates RSA 273-A:5 when it unilaterally changes the terms or conditions of employment for bargaining unit members. The employer cannot avoid a

violation by declaring a position to be outside the bargaining unit. To avoid violations, the employer should communicate with the union about anticipated changes. Specifically, the employer should inform the union when it expects to create a new position so the parties can decide whether the position shares a community of interest with an existing bargaining unit. If the parties reach agreement to include the position in a bargaining unit, the parties should jointly submit a petition to PELRB to modify the bargaining unit, and negotiations over the terms and conditions of employment for the new position should commence. If the parties agree that the position should be excluded from the bargaining unit, no further action is needed. If the parties disagree about whether a position should be included, then the union may file a petition to include the position, and PELRB will hold a hearing and issue a decision.

See Union Exhibit 3.

18. On November 8, 2021, the District's counsel responded to the Union's objection stating that the District had the authority, unilaterally and without notice to the Union, to create the Behavioral Interventionist position and to appoint a bargaining unit employee to this positions.

19. The Union grieved the District's alleged violation of the CBA. The grievance is currently held in abeyance pending the resolution of this case.

20. The Behavioral Interventionist job description provides as follows:

Goal: To provide support, monitoring, and training using behavior management techniques, intervention strategies, coping skills, and problem solving for students with behavioral challenges.

Reports To: Principal/Assistant Principal

Qualifications:

- Strong communication skills, writing and speaking
- Experience working with children in varied settings
- Experience with behavior management procedures
- High school diploma
- Ability to adapt to a variety of situations and to remain calm under pressure
- Attendance and punctuality are important in this position
- Organized with strong working knowledge of technology
- CPI certification or similar training preferred.

Responsibilities:

- Continually supervise students to ensure a safe, non-threatening, nurturing environment where students can thrive.

- Promote highly specialized positive behavior interventions in which "at risk" students thrive: behavior instruction that is explicit, intensive, accelerated and provides ample practice.
- Adapts intervention approaches to provide a setting conducive to student learning
- Provide recognition of a variety of student accomplishments and positive behaviors
- Monitors and records data on behaviors for the purpose of measuring student progress and responsiveness
- Use of assessment tools such as: frequency charting, duration charting, time sampling and response.
- Maintain data on students served. (This includes creation of ongoing data collection systems to establish baseline and ongoing progress for all students, and analyzing data on a frequent and ongoing basis to guide programming decisions.
- Input and review SWIS data reports
- Reports observations and interventions to teachers in a timely manner for the purpose of collaboration and reinforcement
- Consults with school social worker, counselor, school psychologist and teachers
- Provides training to staff on an individual, group or as needed basis regarding specialized instructional strategies and techniques used in behavior intervention.
- Contacts parents/guardians regarding their child's time in the Student Success Center. Determines how to establish a partnership with home.
- Work cooperatively with building administrators to promote positive student behavior by assisting with professional development that targets research, strategies and modeling of instructional practices to support teachers in their implementation of positive behavior support in their classrooms
- Exhibits objectivity and openness to others views; gives and welcomes feedback; contributes to building a positive team spirit
- Engage in on-going professional development to increase knowledge and skills of positive student behavior support for all students, targeted students and students who represent sub-group populations.

See District Exhibit B.

21. The Behavioral Interventionist is expected to work independently and not under the direct supervision of a teacher or other professional. The primary work location for the Behavioral Interventionist is the school Student Success Center, and not a classroom.

22. Paraprofessionals usually work in a classroom setting and under the supervision/guidance of a teacher or other professional.

23. The Instructional Paraprofessional job description provides as follows:

Goal: Work directly with students with guidance from the teacher. Provide coaching and modeling to facilitate the active involvement of students in their educational setting.

Reports To: Principal/Assistant Principal

Qualifications:

- Has strong communication skills, writing and speaking
- Has experience working with children in varied settings; preferred
- Has working knowledge of behavior management procedures; preferred
- Has knowledge of technology; preferred

Responsibilities:

- Ensure the safety of the students within all school and community environments
- Ensure student confidentiality
- Utilize knowledge of the social, emotional, medical, and academic needs of individual students obtained through collaboration with teacher and/or specialist
- Collaborate with the teacher and/or related services providers about the plans, and implementation of activities and resources for the students
- Work with students in variety of ways, which may include an individual, small group, or whole group settings, in the school and/or in the community, as prescribed by instructional programs
- Assist in ongoing monitoring of students' progress which, may include assessing, data collection and computer work
- Communicate essential student information, progress, concerns to the assigned teacher, worksite coordinator, or assigned administrator
- Support in maintaining discipline of students using behavior management plan as directed by classroom teacher.
- Maintain dignity and respect for each student at all times
- May assist teacher or independently perform routine tasks such as, but not limited to: classroom duties, record keeping, limited clerical work, checking and grading papers, gathering/preparing materials for students, assisting with the set-up/clean-up of classroom activities, operating multimedia equipment.
- May assist with the supervision and monitoring of social interactions during non-instructional activities such as bus duty, breakfast/ lunch, recess, student transition between activities, specials/elective and field trips.
- Must be able to stand and work continuously for a minimum of 4 hours per workday.
- Must be able to use arms and hands without restrictions to accommodate the physical, mobility, and ambulatory needs of students.
- Must report to work on time every workday, except as afforded by existing law.

- Must perform all duties as assigned during scheduled workdays.
- Perform other duties as requested by administration to meet the needs of the students.
- Maintain a professional attitude and appearance in all settings as required by district guidelines
- Use initiative to solve problems
- Follow district and building procedures
- The statements herein are intended to describe the general nature and level of work being performed by the employee in this position. They are not intended to be construed as an exhaustive list of all responsibilities, duties, and skills required of a person in this position.

See District Exhibit E.

24. Special Education Paraprofessional job description provides in part as follows:

Qualification: The paraprofessional must have a high school diploma or equivalent

Reports To: Student Services Coordinator and Principal.

Job Goal: Supports special education or classroom teacher with IEP implementation for students with disabilities and promotes independence.

Performance Responsibilities:

1. Ensures the safety of students;
2. Always maintains confidentiality.
3. Becomes familiar with and supports implementation of student IEPs;
4. Performs learning activities as directed and supervised by the classroom teacher for a small group of students.
5. Guides student-center activities.
6. Helps the classroom teacher with instructional strategies or other supports that are required in the IEP.
7. Answers questions in class.
8. Assists with classroom management by implementing classroom rules.
9. Implements position control (positioning oneself in the classroom as a behavior management strategy.)
10. Assists with the testing process.
11. Attends staffing/progress meetings, as requested;
12. Makes copies of notes for students.
13. Supervises individual students or groups of students at various times of day, such as lunch, recess, assemblies or when getting on or off the bus
14. Supervises classroom when the teacher is out of the room for brief periods.
15. Keeps appropriate teachers informed of needs and concerns which may impact the student(s);

16. Contributes to staff rapport, respect and cooperation.
17. Deals with peers in a professional manner and accepts decisions positively and implements changes if necessary.
18. Carries out other duties as assigned by the special education teacher, classroom teacher and/or the principal;

See Union Exhibit 9.

25. New Hampshire Admin. Rule Ed 502.02 (aa) defines a paraeducator as "a person who works under the supervision of a teacher or other appropriate licensed education professional to provide specialized or concentrated non-initial instructional support to students at the pre-K, elementary, or secondary level and might be licensed by the board..."

26. No modification petition to add the Behavioral Interventionist position to the existing bargaining unit has been filed.

Decision and Order

Decision Summary

The Behavioral Interventionist is not a bargaining unit position and the District was not required to notify the Union of its decision to create this position or to bargain with the Union over this position's the terms and conditions of employment. In addition, the evidence is insufficient to show that the creation of this position had an adverse impact on terms and conditions of employment of the bargaining unit employees. Accordingly, the Union's complaint is dismissed.

Jurisdiction

Under RSA 273-A:6, I, the PELRB has primary jurisdiction of all unfair labor practice claims alleging violations of RSA 273-A:5. However, it does not have jurisdiction to interpret a CBA or review the merits of a grievance when the CBA to which the parties are subject provides for binding arbitration or other binding resolution. See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006). See also *Appeal of the State of New Hampshire*, 147 N.H. 106, 108-109 (2001);

Appeal of Silverstein, 163 N.H. 192, 199 (2012).

Discussion

The Union claims that the District violated RSA 273-A:5, I (a), (e), (g), (h), and/or (i) when it (1) unilaterally created a Behavioral Interventionist position, which has the same duties and responsibilities as the positions currently in the bargaining unit; (2) appointed a bargaining unit employee to this position without posting the positions; (3) unilaterally assigned a wage rate to this position outside the CBA wage schedule; (4) "subcontracted" bargaining unit work to a non-bargaining unit position"; and (5) excluded the union from discussion and decision making about a position performing bargaining unit work.

RSA 273-A:5, I provides in relevant part as follows:

It shall be a prohibited practice for any public employer:

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;

...

(e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;

...

(g) To fail to comply with this chapter or any rule adopted under this chapter;

(h) To breach a collective bargaining agreement;

(i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

Further, RSA 273-A:3 requires the employer and employee organization to negotiate in good faith over the terms and conditions of employment. RSA 273-A:1, XI defines terms and conditions of employment, i.e., mandatory subjects of bargaining, as follows:

"Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public

employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

Under RSA 273-A:1, XI, creation of new positions is a managerial prerogative. *Appeal of City of Nashua Board of Educ.*, 141 N.H. 768, 775 (1997)(acknowledging employer's power to create or eliminate positions). See also *Sanborn Regional Education Association, NEA-New Hampshire v. Sanborn Regional School Board*, PELRB Decision No. 1985-063; *SEIU Local 1984, SEA of NH Littleton Police v. Town of Littleton, Littleton Police Department*, PELRB Decision No. 2001-011. Nothing in the statute prohibits an employer from hiring a bargaining unit employee to a non-bargaining unit position. Furthermore, the parties' CBA in this case specifically reserves to the District the right to "to hire, promote, transfer, assign and retain employees in positions within the school district" and "to determine the methods, means and personnel by which operations are conducted..." However, "[a] public employer's greater power to create or eliminate a position or program does not necessarily include the lesser power to unilaterally determine wages and hours for the position or program." *Appeal of City of Nashua Board of Educ.*, supra, 141 N.H. at 775.

In this case, it is undisputed that the District unilaterally created the Behavioral Interventionist position and established the terms and conditions of employment for this position. However, the District's actions are violative of RSA 273-A only if the Behavioral Interventionist is a bargaining unit position. Therefore, the threshold question in this case is whether the Behavioral Interventionist position is a bargaining unit position.

The legislature has vested the PELRB with primary and exclusive authority to determine the composition of and certify bargaining units. See RSA 273-A:8, I. See also *Prof. Fire Fighters*

of Wolfeboro v. Town of Wolfeboro, 164 N.H. 18, 22 (2012); and *Appeal of the University System of N.H.*, 120 N.H. 853, 854 (1980). Moreover, "only the PELRB can modify an existing certified bargaining unit, a process that requires the filing of a proper modification petition." See *Hollis School Board v. Hollis Education Association/NEA-NH*, PELRB Decision No. 2011-045, affirmed, *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337 (2012). The PELRB cannot recognize or effectuate a modification of a bargaining unit in the absence of proper modification proceedings on the basis of public employer conduct since the PELRB lacks jurisdiction to fashion an appropriate equitable remedy under equitable estoppel or some other potentially applicable equitable doctrine. See *Appeal of Somersworth*, 142 N.H. 837, 841 (1998). Modifications or redeterminations of existing bargaining units are governed by Administrative Rule Pub 302.05 and require a filing of a modification petition. See *Appeal of State Employees' Ass'n of N.H., Inc.*, 156 N.H. 426, 428 (2007).

In *Laconia Education Association/NEA-NH v. Laconia School District, SAU #30*, PELRB Decision No. 2004-028, the union complained that the district unilaterally set terms and conditions of employment for the positions of learning alternative behaviors supervisor and technology assistant that adversely affected these employees and resulted in removal of the positions from the bargaining unit. In *Laconia*, the PELRB certification unit description contained the positions of *certified* teaching personnel, school librarians, and guidance personnel. The Board found that the positions in question "lacked the requirement that the individuals be certified" and lacked evidence that the positions in question required certificates from the State Board of Education. *Id.* The PELRB dismissed the complaint finding that the learning alternative behaviors supervisor and technology assistants were not members of bargaining unit subject to parties' contract because their positions, unlike the bargaining unit positions, did not require certification *Id.*

Further, in *Appeal of the Somersworth School District*, supra, 142 N.H. at 838-39, the union filed an unfair labor practice complaint against the district when it refused to process a grievance filed by a job coordinator. The district claimed that he was not a member of the bargaining unit because his employment did not require professional certification and he was never certified by the board of education. Both the recognition clause and the certification described the bargaining unit members as individuals whose employment required “them to hold a professional certificate issued by the State Board of Education.” *Id.* at 839. In *Somersworth*, a job coordinator’s contract was identical to those issued to traditional classroom teachers; he received many of the same benefits as teachers covered by the CBA; and the district has previously processed a grievance filed by him without objecting to his standing to grieve. *Id.* at 839-40. The Supreme Court held that because the job coordinator failed to satisfy the recognition clause requirement of state certification, he was not covered by the recognition clause and was not entitled to file a grievance. *Id.* at 840.

Likewise in *Hollis School Board v. Hollis Education Association/NEA-NH*, Decision No. 2011-045, affirmed, *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337 (2012), the School Board complained that the Union improperly demanded arbitration on behalf of a speech language pathologist (SP) and an occupational therapist (OT) because these positions were not in the bargaining unit covered by the parties’ CBA. The Union countered that both positions were in the bargaining unit because, among other things, for a number of years the School Board treated them as bargaining unit positions. *Id.* The PELRB analysis provided, in part, as follows:

Because the positions of SP and OT are not listed in the certified bargaining unit, and given the PELRB’s lack of authority to modify the bargaining unit in these proceedings based on the prior course of conduct, the question is limited to whether the individual SP’s and OT’s employed in the Hollis School District are in fact “certified teachers” or whether the term “certified teacher” is somehow inclusive of SPs and OTs. The Board understands “certified teacher” to mean an individual holding a teacher certification issued by the State Board of Education, particularly in the 1976 time period..... If the

PELRB certification employed broader and more inclusive language in the description of the bargaining unit we might reach a different conclusion; however, we are constrained in our analysis by the PELRB certification language actually employed.

Id. The PELRB found that, despite being treated like other bargaining unit employees for a number of years, SP and OT were not in the bargaining unit because they were not “certified teachers” and, therefore, were not covered by the 1976 PELRB bargaining unit certification. *Id.* The Supreme Court agreed with the PELRB. See *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337.

Conversely, in *Windham Education Association, Affiliated with NHEA/NEA v. Windham School District, SAU #95*, PELRB Decision No. 2014-237, the union claimed that the district violated RSA 273-A:5, I (a), (e) & (g) when it unilaterally created six new Director positions and assigned to the new positions bargaining unit work currently performed by Deans of existing departments. The Union also complained that the District was creating a “Department Head” position, which according to the Union involved changing the duties of an existing teacher without bargaining. *Id.* The District denied the charges and claimed that the establishment of the Director positions was a change in organizational structure that was a proper exercise of managerial policy within the District’s exclusive prerogative. *Id.* The Hearing Officer found that the District committed an unfair labor practice when it unilaterally removed subject positions from the existing unit because, (1) under both the certification and the CBA recognition clause, the bargaining unit included “all certificated staff” of the District and (2) the subject positions, whether they were modified existing positions or newly created positions, were teaching/guidance positions requiring State certification and, therefore, fell within the definition of the “certificated staff” and were not specifically excluded from the unit. *Id.* Therefore, these positions could be removed from the existing unit only through the utilization of the Pub 302.05 modification procedure; and the District was required to negotiate any changes in terms and conditions of employment for this positions.

The bargaining unit in this case includes Paraprofessionals and Speech Assistants and no modification petition has been filed to add the Behavioral Interventionist position to the bargaining unit. Akin to *Hollis*, the bargaining unit description here doesn't include Behavioral Interventionist position. Therefore, the question is limited to whether the Behavioral Interventionist is in fact a "paraprofessional."

Although there are some similarities between the Paraprofessional job description and the Behavioral Interventionist job description, there are also significant differences. For example, unlike Paraprofessionals, the Behavioral Interventionist is required, among other things, to be able to create data collection systems to monitor progress of all students and analyze data to guide programming decisions; to use assessment tools such as frequency charting, duration charting, time sampling and response; to provide "training to staff on an individual, group or as needed basis regarding specialized instructional strategies and techniques used in behavior intervention"; to contact parents directly, rather than through a teacher, regarding their child's time in the Student Success Center; and to determine how to establish a partnership with home. Also, the Behavioral Interventionist, unlike Paraprofessionals, works in the Student Success Center and not in a classroom.

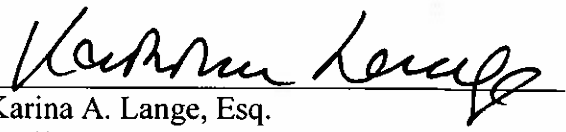
Moreover, a paraprofessional is defined as "a trained aide who assists a professional person (as a teacher or doctor) ..." See *Merriam Webster's Collegiate Dictionary* 843 (10th ed. 1993). Further, New Hampshire Admin. R. Ed 502.02 (aa) defines a paraeducator as "a person who works under the supervision of a teacher or other appropriate licensed education professional to provide specialized or concentrated non-initial instructional support to students at the pre-K, elementary, or secondary level and might be licensed by the board..." Both definitions require that a paraprofessional work under the supervision of a teacher or other professional. However, in this

case, both the job description and the witness statements indicate that the Behavioral Interventionist works independently, and not "under the supervision of a teacher."

For the foregoing reasons, I find that, unlike the unit description in *Windham*, the bargaining unit description here is not sufficiently broad to cover the Behavioral Interventionist position and that, therefore, the Behavioral Interventionist is not a bargaining unit position. In order for this position to be included in the bargaining unit, a party must file a modification petition pursuant to Admin. R. Pub 302.05 and this petition must be granted by the PELRB. Because the Behavioral Interventionist is not a bargaining unit position, the District is not required to notify the Union of its creation or to bargain with the Union over the terms and conditions of employment for this position. In addition, the evidence is insufficient to show that the creation of this position had an adverse impact on terms and conditions of employment of the bargaining unit employees. Accordingly, the Union's complaint is dismissed.

So ordered.

Date: 06/02/2022


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