



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-0191-5

Decision No. 2023-063

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 November 10, 2022, 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 the 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 on objection was held on January 26, 2023. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the hearing, the hearing officer took official notice of the PELRB file in Case No. E-0191-4 in accordance with Admin. R. Pub 203.03 (d). Both parties filed post-hearing briefs on March 8,

2023. The parties' Joint Statement of Stipulated 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 (KSCDSA) bargaining unit. See Joint Exhibit 2, PELRB Decision No. 2016-290 (December 13, 2016).¹

3. The KSCDSA bargaining unit is comprised of the positions listed in the certification order, which generally have supervisory authority over other staff positions. See Joint Statement of Stipulated Facts at 2.

4. In addition to the KSCDSA 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.

5. The Association and the KSC are parties to a collective bargaining agreement (CBA) effective from July 1, 2022 through the June 30, 2025.

6. The CBA Recognition Clause, Article 1.B.2, provides as follows:

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)

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

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.

See 2022-25 CBA (on file with PELRB pursuant to RSA 273-A:16, I.)

7. An accreditation review by the New England Commission of Higher Education (NECHE) in 2021 recommended increased focus on assessment of academic programs and student outcomes by the KSC. See Joint Statement of Stipulated Facts at 7. The NECHE provides regional accreditation to New England institutions providing higher education. Without regional accreditation, an institution, such as the KSC, cannot qualify for financial aid/assistance.

8. The position of Accreditation and Assessment Officer (AAO) was created in 2021 with primary responsibility for program assessment and initiatives. See Joint Statement of Stipulated Facts at 3. The AAO position responsibilities also include some of the accreditation-related job functions previously performed by the Program Manager for Academic Affairs, a position that was eliminated during restructuring of the KSC academic administration in 2020-21. Joint Statement of Stipulated Facts at 4.

9. The AAO is classified by the University System as an "Administrative Services Specialist" (see Position Description KB1345). Joint Statement of Stipulated Facts at 9.

10. In May, 2021, the Association filed with the PELRB a modification petition seeking to add the then-newly-created AAO position to the Directors and Supervisors bargaining unit. The KSC objected to the petition on the ground of confidentiality. See PELRB Case No. E-0191-4.

11. In Case No. E-0191-4, the KSC's objection was sustained and the Association's modification petition was denied. See PELRB Decision No. 2021-171 (October 5, 2021).

12. The PELRB Decision No. 2021-171 included the following footnote:

Notwithstanding 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.

Decision No. 2021-171 was not appealed and became final under Admin. R. Pub 205.01 (c).

13. In its current petition for modification (2022 petition), the Association provides the following reason for modification request:

The employee in this position has not been involved in any confidential personnel labor negotiations related matters and has not been assigned any duties implying a confidential relationship to the employer within the meaning of RSA 273-A:1,IX(c) since the NHPELRB issued Decision No. 2021-171 over a year ago.

14. Kimberly Schmidl-Gagne has served as the AAO since June 26, 2021. Joint Statement of Stipulated Facts at 10.

15. The AAO reports to the Provost and Vice President for Academic Affairs. Dr. James Beeby currently serves as Provost. Joint Statement of Stipulated Facts at 5.

16. The AAO's duties/responsibilities include the following:

Percent of Time - 35%

- Serving as institutional liaison with NECHE and coordinating the institutional response for review, self-study, and interim reports.
- Maintaining knowledge of all NECHE standards and requirements, keeping the President and Provost informed of key changes.
- Communicating with NECHE regarding substantive changes in academic portfolio, program delivery, or institutional leadership.
- Coordinating 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.

Percent of Time – 20%

- 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.

...

Percent of Time – 15%

- 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.
- Assists 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....

Joint Exhibit 1.

17. The AAO has supervisory responsibility over the Assessment Analyst, which is a position represented by the Keene State College Staff Association. Joint Statement of Stipulated Facts at 8. The AAO does not evaluate performance of any employees in the Directors and Supervisors unit.

18. More than one year has elapsed since the issuance of PELRB Decision No. 2021-171. During this time period, the KSC negotiated side agreements with certain KSC unions. The AAO did not participate in these negotiations nor was she privy to the management's thought concerning negotiation strategies or proposals. The AAO is not and has not been a member of the KSC's negotiating team and has not attended confidential negotiation strategy meetings.

19. Since the position was created in 2021, the AAO has not served as the advisor to the President or the KSC administration on any issues related to collective bargaining,

grievances, employee discipline, position/program elimination, or other significant personnel decisions.

20. The AAO has not been involved in "development of the faculty."

21. The AAO's job responsibilities do not include searching through students evaluations for complaints against the faculty or staff. Rather, her duties relate to the assessment of "student learning outcomes," i.e. whether students learned what they were supposed to learn, and are not related to program elimination. The AAO works with mostly aggregated data (i.e. not identified by name). However, like any other KSC employee, if during the course of her work, she would come across a complaint in a student evaluation against a faculty member, she would report it to the management.

22. The AAO does not have access to bargaining unit employees' personnel files or disciplinary decisions concerning unit employees. She does not participate in, or attend, union grievance proceedings or disciplinary meetings; and she is not privy to the employer's thoughts concerning grievance procedure strategies, grievance/disciplinary decision-making, or grievance/disciplinary decisions. She does not recommend hiring, discipline, promotion, or termination of bargaining unit employees.

23. Since the issuance of the 2021 PELRB decision, the AAO has not assisted in budget development or advised the management on budgetary issues. She has not been privy to the management's thoughts concerning budgetary strategies. The KSC's final budget is a public document.

24. She does not open confidential communications; and she is not involved in decision-making concerning hiring, promotions, discipline or other significant personnel actions.

25. The AAO does not recommend program or position elimination. She is not privy to the management thoughts concerning program or position elimination.

26. Undergraduate academic programs are reviewed for viability in accordance with the Undergraduate Program Viability Review Process, approved by the College Senate, using the Program Assessment Template and Program Review Guide. The KSC's Program Elimination Guidelines Task Force, which develops program viability process guidelines, includes representatives of administration, faculty, and unions. Guidelines are not confidential. The September 2022 Undergraduate Program Viability Review Process provides for union participation in the program viability review. See KSC Exhibit 1.

27. Position elimination and retrenchment for both faculty and staff are governed by their respective collective bargaining agreements.

28. Faculty and staff performance is evaluated according to the procedures and criteria set forth in their respective collective bargaining agreements.

29. KSC collective bargaining agreements, which govern performance evaluations, position eliminations, and program retrenchment, are not confidential.

Decision and Order

Decision Summary

The AAO is not 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 and Supervisors bargaining unit is granted.

Jurisdiction

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

Discussion

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 (emphasis added). "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 Town of Moultonborough*, 164 N.H. 257, 263-64 (2012), the Supreme Court agreed with the PELRB that the executive assistant to the police chief was not a confidential employee within the meaning of RSA 273-A:1, IX. The Court stated as follows:

[T]he executive assistant does not maintain personnel files and only the chief has a key to the locked cabinet containing personnel files. Additionally, she does not attend staff meetings or non-public meetings between the chief and board of selectmen. Moreover, although she receives all of the department mail, she does not open mail marked 'confidential.'

The Town's objection to the inclusion of the executive assistant position in the proposed bargaining unit rests largely upon conjecture regarding her role after the unit is certified.

Whatever her potential role may be with regard to labor negotiations, the *objection is premature*... Accordingly, we concur with the PELRB's conclusion that 'the Executive Assistant is not involved with personnel or other confidential labor relations matter[s] in any meaningful way,' and, therefore, should be included in the bargaining unit.

Appeal of Town of Moultonborough, supra, 164 N.H. at 263-64 (citations omitted, emphasis added). In *Moultonborough*, the executive assistant's responsibilities included answering phone calls directed to the police chief, entering payroll information into computer system, conducting billing, handling worker's compensation reports, sending bills to the finance department for payments, and opening departmental mail unless it was marked "confidential." See *NEPBA, Moultonborough Police Association and Town of Moultonborough*, PELRB Decision No. 2011-039, aff'd in part, rev'd in part, *Appeal of Town of Moultonborough*, supra, 164 N.H. at 264. However, the executive assistant did not file anything into the personnel files, had no access to the locked cabinet containing personnel files without the Chief's permission, did not open confidential mail, and did not attend non-public meetings between the chief and the Board of Selectmen. See *id.*

Similarly, 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, in part, 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 because senior policy advisor position was based on specialized knowledge and experience and was not involved in development of labor or personnel policy).

In addition, 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 and Supervisors bargaining unit on the ground that the Director was a confidential employee. In that case, the Director, 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 the 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 for the following reasons: (1) the Director's interactions with the KSC management were based on her specialized expertise in collecting data, producing statistical reports, and conducting and analyzing surveys, and did 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;

and (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 contrast, 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 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).

In Decision No. 2021-171, I found that 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)." See PELRB Decision No. 2021-171 (October 5, 2021)(emphasis added). That decision included, among others, the following findings of fact:

- ... According to the President, the AAO *will* also help lead development of the faculty...
- As part of the assessment duties, the AAO *will* review students' evaluations of faculty and reports and complaints concerning employees.

- The AAO *will* assist in KSC budget development, including in development of "the institutional scope of investment," which is not open to the public.
- According to the KSC President, the AAO *will* have access to personnel files and will advise the President on negotiations with the unions.

See PELRB Decision No. 2021-171 (emphasis added). However, the record in this case shows that during the time that has elapsed since the issuance of Decision 2021-171, the AAO has not been involved in "development of the faculty"; has not participated in budget development; has not have access to personnel files; and has not advised the administration on negotiations with the unions. See Findings of Fact at 18-23. In addition, her duty to report student complaints to the management, if she accidentally comes across them during her work, is not different from any other KSC employee's duty to report student complaints they learn about. Searching for and reporting students complains is not part of the AAO's job responsibilities. The KSC's assertion that such a complaint might affect an employee's evaluation is unpersuasive because employee evaluations are conducted pursuant to CBA evaluation procedures negotiated by the KSC and unions; and the AAO is not privy to management's thoughts or decision-making concerning employee evaluations.

Furthermore, like the Director in *Keene State College Directors and Supervisors Association*, PELRB Decision No. 2016-115, and executive secretary in *Appeal of Town of Moultonborough*, the AAO here is not involved in collective bargaining or significant personnel decisions. She does not have access to personnel files or to grievance or disciplinary decisions and is not privy to management's thoughts concerning significant personnel decisions, collective bargaining, or employee discipline. She does not open confidential communications; and she is not involved in decision-making involving hiring, promotions, discipline or other significant personnel actions. Although the KSC emphasizes that the AAO's assessment and compliance-related work may eventually contribute to program elimination, this emphasis is misplaced. Even

if the management might utilize the assessment and compliance related data provided by the AAO, like the Director in *Keene State College*, PELRB Decision No. 2016-115, the AAO does not recommend program or position eliminations nor is she privy to management's thoughts or decisions regarding program or position elimination. Moreover, the program elimination follows guidelines developed in collaboration with unions and unions are involved in program elimination process. Therefore, program elimination process is not confidential with respect to unions.

Like the town's objection to the inclusion of the executive assistant in *Moultonborough*, the KSC's objection to the inclusion of the AAO rests upon conjecture regarding her role in the future; and like in *Moultonborough*, "[w]hatever her potential role may be with regard to labor negotiations, the *objection is premature...*" *Appeal of Town of Moultonborough*, supra, 164 N.H. at 263-64 (citations omitted, emphasis added).

Based on the foregoing, the AAO is not involved in confidential personnel or labor negotiations related matters, and therefore, is not a "person whose duties imply a confidential relationship to the public employer" within the meaning of RSA 273-A:1, IX (c). Accordingly, the Association's request to add the Accreditation and Assessment Officer to the Directors and Supervisors bargaining unit is granted and the bargaining unit description is modified accordingly. A Unit Modification order shall issue in due course.

So ordered.

Date: 04/04/2023


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

Distribution: Rachel Hawkinson, UniServ Director
Karyl Roberts Martin, Esq.