



State of New Hampshire
Public Employee Labor Relations Board

Hudson School District

and

AFSCME Council 93, Local 1906, AFL-CIO

Case No. E-0152-4

Decision No. 2024-009

Appearances: Peter C. Phillips, Esq., Soule, Leslie, Kidder, Sayward & Loughman, PLLC, Salem, NH, for the Hudson School District

Justin P. Murphy, Esq., Senior Associate General Counsel, AFSCME, Council 93, Boston, MA, for AFSCME Council 93, Local 1906, AFL-CIO

Background:

On August 15, 2023, the Hudson School District (District) filed a modification petition pursuant to N.H. Admin. Rule Pub 302.05 seeking to remove the position of School Counselor from the existing bargaining unit represented by AFSCME Council 93, Local 1906, AFL-CIO (AFSCME). The District provides the following reason for its request: the current bargaining unit is incorrect to a degree warranting modification because School Counselors are included in the unit with employees that are their direct supervisors, including the Director of School Counseling and Principals.

The District simultaneously filed a modification petition in Case No. E-0243- 2 seeking to add School Counselor position to the teachers' bargaining unit represented by the Hudson Federation of Teachers, AFT #2263, AFT-NH, AFL-CIO (HFT) "so that the school counselors will not be unrepresented for purposes of collective bargaining."

The AFSCME objects to the modification petition for the following reasons: (1) the petition violates Admin. R. Pub 302.05 in that there have been no changes in circumstances warranting modification of the unit; (2) there have been no changes to duties and responsibilities of School Counselors or Principals since the unit was last modified; (3) during negotiations on a successor CBA, the District proposed to remove the School Counselors from the AFSCME bargaining unit, the AFSCME rejected this proposal, and the parties executed and ratified the CBA without removing School Counselors; (3) the District seeks from the PELRB what it could not accomplish during the negotiations; and (4) the authority to discipline School Counselors “lies solely with the Superintendent.”¹

A hearing was held on November 3, 2023. The parties had the full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. Pursuant to Admin. R. Pub 203.03 (d), I take official notice of the following PELRB files related to the subject bargaining unit: Case Nos. A-0570; E-0152-2; and E-0152-3. The post hearing briefs were filed on December 8, 2023; and the decision is as follows.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:I, X.
2. The AFSCME is an employee organization certified as the exclusive representative of the following bargaining unit:

Unit: Permanent full time Principals, Assistant Principals, School Counselors, Dean of Academics, Department Heads, School Psychologist, Directors of School Counseling, Athletics, Career and Technical Education, and Music, Transition Coordinator, K-12 and the Community and Business Liaison.

Excluded: Superintendent of Schools, Assistant Superintendent of Schools, Director of Special Services, Business Administrator, and all other employees of the District.

¹The HFT filed a limited objection to the District’s petition to add School Counselors to the HFT-represented unit in Case No. E-0243-2.

See PELRB Decision No. 2019-233 (October 9, 2019).

3 This bargaining unit consists of 53 total employees, 14 of whom are employed as School Counselors. See Stipulations at 3.

4. This unit has been in existence since 1993. In March of 1993, the AFSCME filed a petition for certification seeking to represent the following bargaining unit: Permanent full-time *Principals*, Assistant Principals, *Guidance Counselors*, *Directors*, Assistant Directors, Department Heads, and Librarians. (Emphasis added.) Superintendent of School, Assistant Superintendent, and Business Administrator were excluded. The District agreed with the unit composition. The PELRB conducted a representation election pursuant to RSA-A:10. The voters selected the AFSCME as their exclusive representative and the PELRB issued a Certification of Representative and Order to Negotiate on June 2, 1993. This unit was certified through the representation election process under RSA-A:10 and not through the process of “recognition” under the “grandfather clause,” Laws 1975, 490:3.

5. In 2014, the District filed an agreed-upon modification petition seeking to specifically exclude the Director of Special Services (i.e. to add this position to the “Exclusions” list) and to otherwise update the unit description, including changing the job title of Guidance Counselor to School Counselor. The District provided the following reasons for the request: “The parties negotiated changes to the bargaining unit during the course of bargaining for a successor agreement. The parties specifically agree to exclude the position of Director of Special Services, and otherwise update the PELRB certification so that it is consistent with the parties’ contractual recognition clause.” PELRB Case No. E-0152-2. The District’s petition was granted. See PELRB Decision No. 2014-166 (July 2, 2014).

6. In 2019, the AFSCME filed an agreed-upon modification petition seeking to remove the media specialist position from the bargaining unit. This petition was granted. See PELRB Decision Nos. 2019-232 & 2019-233. The position of media specialist was added to the teachers' bargaining unit represented by Hudson Federation of Teachers, AFT #2263, AFT-NH, AFL-CIO. See PELRB Decision Nos. 2019-234 & 2019-235.

7. No petitions for modification have been filed since the issuance the 2019 modification until the filing of the current petition.

8. School Counselors have been in the same bargaining unit with Principals and Directors since 1993 and have been covered by several successive CBAs. This is the first time the District has requested that the PELRB remove the School Counselor position from the unit.

9. The District and the AFSCME are parties to a CBA effective from July 1, 2022 through June 30, 2024.

10. During the negotiations on the current CBA, the District proposed to remove School Counselors from the bargaining unit. The AFSCME rejected this proposal. The parties engaged in mediation over this issue. During the mediation, the District withdrew its proposal to remove the School Counselors from the unit. The parties eventually settled and signed the 2022-24 CBA, which contains the following Recognition Clause:

The Hudson School Board recognizes the American Federation of State, County and Municipal Employees (AFSCME), Local 1906 Council 93, AFL-CIO as the exclusive bargaining representative for all Principals, Assistant Principals, *School Counselors*, Dean of Academics, Department Heads, School Psychologist, and Directors of School Counseling, Athletics, Career and Technical Education, and Music, of the Hudson School District for the purpose of bargaining wages, hours, and conditions of employment pursuant to New Hampshire Law RSA 273-A.

See Joint Exhibit 1 (emphasis added).

11. School Counselors' responsibilities include the following:

The School Counselor provides a wide range of services and programs designed to meet the personal, social-emotional, career, and educational needs of students. The School Counselor addresses the needs of the entire student population by offering individual, small group and classroom guidance activities, organizing and implementing school-wide programs that emphasize character and citizenship, supervising testing programs, facilitating the process of transition to the middle and high school and functioning as the communication link throughout the school community...

See District Exhibits 2 & 3.

12. School Counselors' duties and responsibilities have not changed since the issuance of the 2019 modification; and the evidence is insufficient to show that they have changed in any material respect since the issuance of the original 1993 certification.

Decision and Order

Decision Summary:

The District failed to allege, and the evidence is insufficient to prove, that there has been a change in circumstances since the bargaining unit was last modified to warrant a modification of the bargaining unit in this case. The District's modification petition is dismissed.

Jurisdiction

The PELRB has jurisdiction of all petitions to determine and modify bargaining units pursuant to RSA 273-A:8² and Admin. Rule Pub 302.05. 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).

Discussion:

Modifications of existing bargaining units are governed by Admin. Rule Pub 302.05, which provides in relevant part as follows:

- (a) Where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed, or where a prior unit recognized under the

²The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10..." RSA 273-A:8, I.

provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification in the composition of the bargaining unit, the public employer, or the exclusive representative, or other employee organization if the provisions of section (d) are met, may file a petition for modification of bargaining unit.

(b) A petition shall be denied if:

(1) The question is a matter amenable to settlement through the election process; or

(2) The petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.³

Admin. R. Pub 302.05. The PELRB "must follow its own rules and regulations ..." See *Appeal of State Employees' Ass'n of N.H., Inc.*, 156 N.H. 426, 428 (2007).

The threshold consideration in a unit modification case is whether a moving party, here the District, has satisfied its burden of proving by a preponderance of the evidence that a change in circumstances has occurred since the bargaining unit was last certified or modified, here October 9, 2019. See *Rochester Municipal Managers Group and City of Rochester*, PELRB Decision No. 2009-182 (September 3, 2009). See also *Salem Public Administrators' Association and Town of Salem*, PELRB Decision No. 2009-171 (August 18, 2009); *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (September 25, 2008); *Lebanon Support Staff Association, NEA-New Hampshire and Lebanon School District*, PELRB Decision No. 2004-005 (January 12, 2004). The District, however, argues that it is not required to show a change in circumstances because the unit composition is incorrect to the degree of warranting modification as a matter of law. I find the District's argument unpersuasive. The

³The purpose of Admin. Rule Pub 302.05 (b)(2) is to "prevent the parties to the CBA from agreeing to unit composition and then entering the CBA on that basis and thereafter ... appearing at the PELRB and, contrary to the prior agreement on the unit composition and the CBA, asking the PELRB to alter the bargaining unit." See *NEPBA, Inc. Local 50 et al v. State of New Hampshire, Department of Safety, DMV*, PELRB Decision No. 2006-169 (October 5, 2006), affirmed, *Appeal of State Employees Association of New Hampshire, Inc.*, Supreme Court Case No. 2007-0114 (November 14, 2007). See also *Appeal of the Bow School District*, 134 N.H. 64, 71 (1991) ("established expectations in collective bargaining should not be casually altered...").

rulemaking history and the language of subsection (a) of the rule (specifically, “where a prior unit recognized under the provisions of RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification” (emphasis added)) indicate that it was intended to cover only bargaining units that were “grandfathered” or “recognized” pursuant to the “grandfather clause” of the statute and, therefore, did not go through the normal unit determination and election procedures. See *Laws 1975, 490:3, State Employees Ass’n v. NH. Pub. Employee Labor Relations Bd.*, 116 N.H. 653 (1976).⁴ Therefore, to modify a non-grandfathered unit, a petitioner must allege and prove that the circumstances have changed since the formation or modification of the bargaining unit relative to bargaining unit composition. Examples of a change in circumstances that may warrant modification of a bargaining unit include a creation of a new position, a modification of a job description/duties, and an increase in working hours resulting in a material change in the nature of the position.⁵

In this case, the unit was certified in 1993 following the completion of representation election procedure conducted pursuant to RSA 273-A:10. This unit is not a “recognized” or grandfathered unit that existed prior to the 1975 effective date of the Act. Therefore, the District is subject to the change in circumstances requirement under Admin. R. Pub 302.05. However, the District failed to allege, and offer sufficient evidence of, a change in circumstances warranting modification of an existing bargaining unit.


⁴Grandfather clause of Laws 1975, 490:3 provided that “[n]othing in this chapter shall terminate or modify a bargaining unit, certification of an exclusive representative, or collective bargaining agreement in existence on the effective date of this chapter.” See *State Employees Ass’n v. NH. Pub. Employee Labor Relations Bd.*, supra, 116 N.H. at 654. The grandfather clause of the statute has since expired but the bargaining units “recognized” under that clause are still valid units despite the fact that they did not go through the unit determination and election procedures. *Id.* at 655-56.

⁵See *Town of Gilford and AFSCME Council 93, Local 534, Gilford Public Works Employees*, PELRB Decision No. 2015-196 (August 31, 2015); *Windham School District, SAU #95 and Windham Education Association, Affiliated with NHEA/NEA*, PELRB Decision No. 2015-148 (June 30, 2015); and *Appeal of Bow School District*, supra, 134 N.H. at 73.

Further, the District's reliance on *Appeal of New Hampshire Retirement System*, 167 N.H. 685, 692 (2015), is misplaced because the petitioner in *Retirement System*, unlike the District in this case, alleged and proved that the change in the contested positions from "supervisors-in-name" to "supervisors-in-fact" "constituted a material change in circumstances warranting modification of the unit." *Id.* at 689. Here, the District failed to prove or even allege that a change in circumstances warranting modification has occurred, as required under Admin. R. Pub 302.05. Accordingly, the petition for modification is dismissed.

So ordered.

Date: 01/16/2024


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