This decision was affirmed on appeal per March 9, 2012 Supreme Court order in *Appeal of Hollis Education Association & a.*, NH Supreme Court Case No. 2011-0281.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hollis School Board

v.

Hollis Education Association/NEA-NH

Case No. E-0037-2

Decision No. 2011-045

Appearances:

Thomas M. Closson, Esq., Jackson Lewis LLP, Portsmouth, New Hampshire for the Complainant

James F. Allmendinger, Esq., NEA-NH, Concord, New Hampshire, for the Respondent

Background:

The Hollis School Board filed an unfair labor practice complaint against the Hollis Education Association/NEA-NH on August 6, 2010, complaining that the Association has improperly demanded arbitration pursuant to the grievance procedure contained in the parties' collective bargaining agreement for a speech language pathologist and an occupational therapist. According to the School Board neither position is in the bargaining unit and therefore the Association cannot bring the grievances to arbitration on that basis. The School Board claims that the Association's conduct violates RSA 273-A:5, II (f) and (g) and requests that the PELRB order the Association to cease and desist its demands for arbitration.

The Association denies the charges and argues that both positions are in the bargaining unit and therefore the demands for arbitration were proper. The Association requests that the underlying grievances continue to arbitration as it has demanded.

On October 5, 2010 this Board held a hearing at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs and the Board's decision is as follows.

Findings of Fact

1. The Hollis Education Association/NEA-NH is the certified exclusive representative of employees holding positions in the following bargaining unit pursuant to the PELRB December 7, 1976 certification:

> Certified full-time teachers, librarians and guidance counselors who actively teach at least 50% of their time in the Hollis School District and are employed by said district, in accordance with Article I, Agreement dated October 1, 1975.

2. The Hollis School Board is a public employer within the meaning of RSA 273-A:1, IX.

3. There is no evidence in the record to show that Speech Language Pathologists (SPs) and Occupational Therapists (OTs) were employed in the Hollis School District (District) at the time the bargaining unit was certified in 1976.

4. The State Department of Education issues certifications for teachers and for SPs per RSA 21-N:9 and RSA 189:14-e. SPs holding licenses pursuant to RSA 326-F and 328-F automatically meet RSA 189:14-e certification requirements.

5. Robin Fitton is an SP who was employed in the District from 2002 through 2010. She has a speech language pathologist license from the New Hampshire Office of Licensed Allied

Health Professionals and from the Massachusetts Division of Professional Licensure. She is a member of the American Speech-Language Hearing Association.

6. Ms. Fitton was presented with and signed a "New Hampshire Teacher Contract Annual" for each year of her employment with the District. In July, 2002 she provided a written receipt to then Superintendent of Schools Kenneth DeBenedictis acknowledging she had received a copy of the July 1, 2002 to June 30, 2004 collective bargaining agreement. Superintendent DeBenedictis was eventually succeeded by Susan E. Hodgdon as superintendent in July of 2008.

7. Pamela Banks is also a SP and has a license from the New Hampshire Office of Licensed Allied Health Professionals. She is also a member of the American Speech-Language Hearing Association. She signed a "New Hampshire Teacher Contract Annual" every year from 1994 through 2009, and she has also provided a written receipt to Superintendent DeBenedictis acknowledging she had received a copy of the collective bargaining agreement.

8. For the 2010-2011 school year the District did not provide Ms. Banks with the standard "New Hampshire Teacher Contract Annual." Instead, in July, 2010 Superintendent Hodgdon sent Ms. Banks an employment agreement letter which reflects the District's current view that Ms. Banks is not a bargaining unit employee and is not entitled to an employment agreement based upon the provisions of the collective bargaining agreement.

9. William Olszewski is an Occupational Therapist (OT) employed in the District and like Ms. Banks and Ms. Fitton had always received a standard "New Hampshire Teacher Contract Annual" prior to 2010. In 2010 he did not receive that standard contract but was instead provided with essentially the same individual employment agreement that was offered to Ms. Banks based upon the District's conclusion that he was not a bargaining unit employee.

10. When he was hired Mr. Olszewski received confirmation from Superintendent DeBenedictis and at least one other District representative that his employment was covered by the collective bargaining agreement and he needed to sign a standard "New Hampshire Teacher Contract Annual." Mr. Olszewski believes his compensation may have been greater had he not been restricted by the negotiated salary schedules reflected in the collective bargaining agreement.

11. Until 2010 Ms. Fitton, Ms. Banks and Mr. Olszewski were treated as though they were members of the bargaining unit, either because District officials believed they in fact held positions covered by the bargaining unit certification or for administrative convenience. In addition to receiving the standard teacher contract prior to 2010 they were also listed on salary schedules (along with undisputed bargaining unit employees) referenced during the course of negotiations in 2005, 2007, and 2009.

12. The inclusion of the SP and OT positions in the bargaining unit was the subject of an Association proposal during collective bargaining in the April, 2010 time period.

13. In April, 2010 Superintendent Hodgdon notified Ms. Fitton that due to a reduction in force caused by decreasing enrollments and budgetary reductions her employment would end on June 30, 2010.

Decision and Order

Decision Summary:

Hollis School District speech language pathologists and occupational therapists are not covered by the 1976 PELRB bargaining unit certification and accordingly the School Board's complaint is sustained on that basis.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

This case requires the Board to resolve whether SPs and OTs hold positions covered by the PERLB bargaining unit certification issued in 1976. That certification describes the bargaining unit as "certified full-time teachers, librarians and guidance counselors who actively teach at least 50% of their time in the Hollis School District..." Although they are licensed or certified SP's and OT's, and not certified teachers, SP's and OT's received standard teacher contracts until 2010, were referenced in wage schedule information referenced during collective bargaining, were required to acknowledge receipt of the collective bargaining agreement, and at least one individual (Mr. Olszewski) was told by District representatives that he could not negotiate his compensation arrangement because the District was obligated to comply with the collective bargaining agreement. The Association and the School Board and the District dealt with SPs and OTs in this way for a number of years.

This history shows that for a number of years prior to 2010 SP and OT positions were treated just like bargaining unit positions, and in particular just like the certified teacher position. However, this history does not settle the dispute in this case. The District may provide non-bargaining unit employees with the same terms and conditions of employment as bargaining unit employees without "fear of enlarging the bargaining unit." *See Appeal of Londonderry School District,* 142 N.H. 677, 682 (1998). Collective bargaining agreements "may reflect the rights of employees not included in bargaining units." *Id. (citations omitted).* Additionally, only the PELRB can modify an existing certified bargaining unit, a process that requires the filing of a

proper modification petition. 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).

The "supremacy" of PELRB bargaining unit certifications was illustrated in a recent case in which the Board was called upon to resolve a conflict between the PELRB's bargaining unit certification on record and a collective bargaining recognition clause by finding that the certification defined the bargaining unit:

> Under RSA 273-A:8, I, "[t]he board or its designee shall determine the appropriate bargaining unit...when petitioned." "The composition of a bargaining unit is limited by law to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB." *Appeal of Londonderry School District*, 142 N.H. 677, 680 (1998)(citations omitted). *Appeal of Londonderry* involved a "grandfathered" unit in existence prior to the effective date of RSA 273-A.
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> The process for requesting the board's review and approval of a change to a previously certified bargaining unit involves the filing of a modification petition in accordance with Pub 302.05. AFSCME states in its brief that it "is mere oversight that the Board certification was never amended to reflect the same (the recognition clauses)." Whatever the reason, the Town and/or AFSCME have never filed a modification petition seeking a change to the 1985 amended certification, and accordingly the description of the Milford Police Employees bargaining unit contained in the recognition clause since 1988 has never been reviewed or approved by the board.

Town of Milford v. AFSCME Local 3657, Milford Police Employees, PELRB Decision No. 2007-183.

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. There is insufficient evidence to establish that a different meaning was intended at the time the bargaining unit certification issued in 1976, and the Board has determined that the involved employees in this case do not have teacher certifications. The Association offers a strong argument that these employees must be certified teachers given their employment history in the District. However, in the final analysis we find that the involved employees are licensed SPs and OTs, or perhaps certified SPs and OTs, but not certified teachers. There is a difference which we are compelled to recognize. 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.

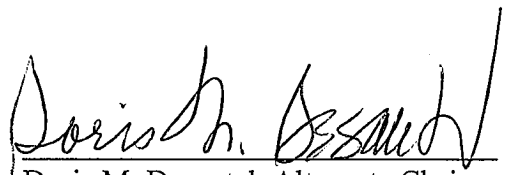
In deciding this case we are sympathetic to the plight of the affected employees but note that the applicable law does not provide us with much leeway to reach a decision that reflects the history of the bargaining unit and the treatment of the SP and OT positions. It is apparent that the School Board and new Superintendent's actions in 2010 represent a reversal of established, understood, and accepted practice, and that they have taken refuge in the legal sanctuary provided by the *Somersworth* and *Londonderry* decisions, primarily, if not entirely, because of budgetary concerns. While we must recognize the right of the Superintendent and the School Board to do so, we are not required to approve of their conduct and decision. Hopefully this case will serve as something of a clarion call to parties in similar situations of the importance of filing proper modification petitions in a timely manner. The maintenance of accurate and up to date PELRB bargaining unit certifications helps establish clarity as to the scope of bargaining

units that is beneficial to employee organizations, public employers, public employees, and the Board.

In accordance with the foregoing the School Board's unfair labor practice is sustained. The disputed positions are not part of the PELRB bargaining unit certification and therefore the PELRB cannot recognize any right of the Association to proceed to arbitration on that basis.

So ordered.

February 9th, 2011.



Doris M. Desautel, Alternate Chair

By unanimous vote of Alternate Chair Doris Desautel, Board Member Kevin E. Cash and Board Member Carol M. Granfield.

Distribution:

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