NH Supreme Court declined appeal of this decision on 05/07/2015.
(NH Supreme Court Case No. 2015-0189

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Windham Education Association,
Affiliated with NHEA/NEA

v.

Windham School District, SAU #95

Case No. E-0111-3
Decision No. 2014-237

Appearances:

James F. Allmendinger, Esq., for the Windham Education Association, Affiliated with NHEA/NEA

Michael S. Elwell, Esq., Soule, Leslie, Kidder, Sayward & Loughman, P.L.L.C., Salem, New Hampshire, for the Windham School District, SAU #95

Background:

On April 4, 2014, the Windham Education Association (Association or Union) filed an unfair labor practice complaint claiming that the Windham School District (District) violated RSA 273-A:5, I (a), (e) and (g) when it unilaterally removed bargaining unit work from the bargaining unit by creating six Director positions and assigning to these positions work currently performed by bargaining unit employees – the Deans of existing school departments such as the math, fine arts, guidance, and science departments. The Association also complains that the District is changing the duties of bargaining unit employees without bargaining. The District plans to eliminate the Dean positions as the Director positions are filled and treat the Directors as non-bargaining unit positions. The District has filled four Director positions, three by appointing current Deans. A fourth Dean did not apply and an external hire has filled the fourth position. The District plans to fill the remaining Director positions (Directors of Language Arts and Social Studies) in the spring of 2015. The Association requests that the PELRB issue a cease and desist

order and, in particular, rule that the District may not unilaterally remove bargaining unit work from the unit and may not change the duties of existing bargaining unit employees without bargaining.

The District denies the charges. The District states that the establishment of the Director positions is a change in organizational structure that is a proper exercise of managerial policy within the District's exclusive prerogative. The District requests that the PELRB dismiss the complaint.

The adjudicatory hearing was conducted on June 5, 2014 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs on July 2, 2014. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

Findings of Fact

1. Pursuant to the PELRB certification, the Association is the certified exclusive representative for "all certificated staff, school nurses, physical therapists, occupational therapists, speech pathologists, guidance counselors, special education evaluators, RTI teachers, and extra curricular personnel" employed by the District. The following employees are excluded from the bargaining unit: Superintendents, Assistant Superintendents, Principals, Assistant Principals, Title I Teachers, Literacy Success and ESOL Teachers. See PELRB Decision No. 2013-185 (October 2, 2013).

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

3. The Association and the District are parties to a collective bargaining agreement (CBA) effective from July 1, 2014 through June 30, 2016. The CBA was signed on May 19 & 20, 2014 and is on file with the PELRB per 273-A:16, I.

4. Neither the Recognition clause nor any other portion of the parties' CBA refers to

Deans. Teachers are in the bargaining unit and all those serving as Deans are Teachers. See Stipulated Facts at 10.

5. The parties' 2008-2011 CBA, Article 1, titled Recognition Clause, provides in part as follows:

> The Board recognizes the Association as the exclusive representative of all certificated staff, including certified nurses who spend more than 50% of their duty hours in classroom teaching and extra-curricular personnel who are members of the bargaining unit employed by the Windham School District for the purposes of collective negotiations. The Board agrees to negotiate with representatives of the Association in accordance with the procedures outlined in Article II....
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> ...
>
> The term "teacher" as used in this Agreement shall mean a professional employee of the Windham School District whose position requires certification by the State Board of Education as a professional. Superintendent, Assistant Superintendent, principals, assistant principals are excluded from the negotiations unit and from this definition of teacher.

See District Exhibit 1.

6. The District operates a high school, a middle school, two elementary schools and a preschool program. The Windham High School opened in 2009. See Stipulated Facts at 1 & 2. The High School building administration included Building Principal, Assistant Principal, Athletic Director, and Special Services Director. Below them were Department Deans, who, in turn, oversaw Department Heads.

7. Currently, each District school has one Assistant Principal. The Assistant Principal's responsibilities include scheduling, organization of events, and discipline of students. The Assistant Principal is not involved with curriculum instruction or daily supervision. Neither Principals nor Assistant Principals teach. See Union Exhibit 5.

8. At the time the complaint was filed, six Teachers served as Teacher-Deans for grades 9-12 at the High School (Deans of Music, Language Arts, Social Studies, Mathematics, and Science and Director of Guidance). See Stipulated Facts at 3 and District Exhibit 2D.

9. The Deans were paid a teacher's salary in accordance with the CBA wage schedule plus a $5000 stipend.

10. The 2012-2014 Job Description for the Dean of Mathematics & Business provides in part as follows:

SCOPE:

To work with the school community in a variety of leadership capacities, including school leadership, staff development, curriculum and program development, general management, and personal professional development to ensure the success of the mathematics and business departments at Windham High School, Windham High School as a whole, and each individual Windham High School student.

QUALIFICATIONS:

A. Education

Advanced degree in curriculum and instruction, secondary education, administration, and/or a related field. New Hampshire certification in mathematics.

B. Experience

- Minimum of five years successful teaching experience, preferably at the secondary level;
- Previous administrative experience, or potential;
- Experience with, or potential for, providing leadership in action research, active learning, team-teaching, and interdisciplinary learning;
- Experience with, or potential for, professional responsibilities in:
    - School leadership;
    - Faculty support, supervision, and evaluation;
    - Curriculum and program development;
    - School management;

The Dean's responsibilities include the following:

A. Essential Functions

1. Supervises the development, instruction, and assessment of curricula and daily operations of mathematics and business departments at Windham High School;
    a. Develops curricula consistent with the Common Core State Standards, or New Hampshire State Curriculum Frameworks GSEs and current best practices in teaching and learning;
    b. Ensures that curricular course goals, content, syllabi, assessments, and rubrics are consistent across the curriculum;
2. Assists the administration in identifying, interviewing, selecting, and in the orientation of new staff:
    a. Articulates professional staff competencies and essential traits;

3. Works with staff, students, and parents to foster a positive school climate by encouraging respectful, honest, appropriate, and professional approaches to individual, school and community-wide concerns;

a. Facilitates student-teacher or parent-teacher communication, as needed:

b. Clarifies and communicates school or district policies, as needed;

c. Prepares reports for the Superintendent/Assistant Superintendent of Schools and the High School Principal, as requested;

...

6. Develops and administers the budget in assigned areas:

a. Maintains inventory of all textbooks and teaching materials;

7. Teaches three classes per semester.

B. Other Functions

Performs other tasks and assumes other responsibilities as assigned by the Principal of Windham High School.

SUPERVISES: Mathematics and Business Department Professional Staff

REPORTS TO: Windham High School Principal

TERMS OF EMPLOYMENT: 190 day contract.

District Exhibit 2A. Job Descriptions for Dean of Science & Engineering, Dean of Living, Fine, and Technical Arts, Dean of English/Language Arts, and Dean of Social Studies & World Language contain virtually identical qualification requirements and performance responsibilities.

11. Under the 2012-2014 Job Descriptions, the Dean of Science & Engineering supervises Science and Engineering Department professional staff; the Dean of Living, Fine, and Technical Arts supervises Living, Fine, and Technical Arts Department professional staff; Dean of English/Language Arts supervises English/Language Arts Department professional staff; and the Dean of Social Studies & World Language supervises Social Studies & World Language Department professional staff. See District Exhibits 2B, 2C, 2E, & 2F (these exhibits are incorporated by reference in full into the Findings of Fact).

12. The 2012-2014 Job Description for the Director of Guidance position provides in part as follows:

SCOPE: To support the school's instructional program by coordinating and supervising guidance activities which are designed to assist students in their personal, social and intellectual development.

QUALIFICATIONS:

A. Education
- Certified as a Guidance Counselor by NH DOE.
- Master's Degree in the area of Student Personnel Services or Counseling.

B. Experience:
- Completed a minimum of five years of successful experience as a school guidance counselor;
- Director of Guidance or Supervisor of Student Personnel Services experience preferred;

PERFORMANCE RESPONSIBILITIES:

A. Essential Functions
- *Oversees overall operation* of the Guidance Office.
- *Supervises and evaluates guidance counselor(s) and guidance secretaries and Registrar.*
- Implements comprehensive grades 9-12 guidance programming for all students.
- Provides post-secondary information opportunities to all students.
- Maintains a personal student caseload and providing individual guidance and counseling.

...

- *Creates, maintains, and manages the guidance budget.*

...

- Serves on committees as needed/assigned.
- Performs other tasks and assume other responsibilities as assigned by the Building Principal or Superintendent.

B. <u>Scheduling</u>
- Co-facilitates the master scheduling process with the Principal for grades 9-12.

...

- Creates, implements, and manages the scheduling process for grades 9-11.
- With coordination from the guidance staff at the middle school, creates, implements, and manages the scheduling process for grade 8 (incoming grade 9).

...

SUPERVISES: Guidance Department Professional Staff

REPORTS TO: Windham High School Principal

TERMS OF EMPLOYMENT: 200 day contract.

See District Exhibit 2D (emphasis added).

13. Annual Teacher Contract between the District and Mary Anderson, signed June 13, 2013, designates her assignment as Dean of Mathematics and Business and provides for a

$5000 stipend. The following teachers signed similar contracts around the same date: Bethany Bernasconi – for the position of Dean of Science and Engineering; Jared Cassidy – for the position of Dean of Living, Fine and Technical Arts; Julie Lichtmann – for the position of Dean (Director) of Guidance; Lisa Roeder – for the position of Dean of English; and Gregory Racki – for the position of Dean of Social Studies and Foreign Language. See District Exhibits 3A-3F.

14. During each 8-period day, the Teacher-Deans of Language Arts, Social Studies, Mathematics and Science teach for 3 periods at grades 9-12, participate in professional learning communities for 1 period, have planning time for 1 period, perform cafeteria and other duties for 1 period, and perform Dean functions for 2 periods. See Stipulated Facts at 4.

15. During each 8-period day, the Teacher-Dean of Music teaches 2 periods at grades 9-12, assists the Director of Curriculum and Instruction with curriculum development for 2 periods, participates in professional learning communities for 1 period, has planning time for 1 period, and performs Dean functions for 2 periods. See Stipulated Facts at 5.

16. During each 8-period day, the Director of Guidance teaches no classes, is responsible as a Guidance Counselor for a reduced student caseload at grades 9-12 for the equivalent of 3 periods, participates in professional learning communities for 1 period, has planning time for 1 period, performs cafeteria and other duties for 1 period, and performs Director of Guidance functions for 2 periods. See Stipulated Facts at 6 and District Exhibit 2D.

17. The Dean functions include ordering books and other items, participating with the Principal and other Teachers in interviews and reference checks for teacher hiring, consulting with Teachers on a voluntary basis about curriculum and performance, proposing budgets for their departments at grades 9-12, scheduling, and addressing student placement appeals. See Stipulated Facts at 7.

18. Teachers are employed on 186-day contracts, with 15 additional days for the Director of Guidance, and 5 additional days for the other Deans. See Stipulated Facts at 8.

19. During each 8-period day, High School Teachers who are not Deans generally teach for 5 periods, participate in professional learning communities for 1 period, have planning time for 1 period, and perform cafeteria and other duties for 1 period. See Stipulated Facts at 9.

20. Lisa Roeder has been the Dean of English since 2012. She was a member of the planning team that set up the District High School. She has been teaching for 25 years and is certified as School Administrator. From 2008 to 2012 she was the Dean of Humanities. Humanities included English, Social Studies, and Foreign Languages. Later, English was separated from Humanities and Ms. Roeder's position was split because the school enrollment has increased. According to Ms. Roeder, when she was hired in 2008, the position required that a candidate be qualified as administrator or have experience working in that capacity.

21. Ms. Roeder testified that as Dean, she "informally" supervises 27 teachers. Her responsibilities include oversight of budget and curriculum. She provides support and advice regarding curriculum to other teachers. She proposes budget to the Principal who, in turn, submits it to the District administration. As Dean, she also conducts monthly meetings, participates in hiring process, and gives hiring recommendations to the Principal. She is a member of the hiring panel along with the Principal and another Teacher (not a Dean). Panel reviews candidates' application materials, participates in interviews, discusses candidates, and makes recommendations to the Principal. The Principal makes hiring recommendations to the Superintendent.

22. As Dean, Ms. Roeder does not issue formal discipline such as written warning and/or suspension. Occasionally, she is asked by the Principal to talk to a teacher regarding appropriate attire or knowledge of curriculum. Administration asks her for feedback on Teachers' abilities. If a Teacher decides not to comply with the rules, she must report that Teacher to the Principal and the Principal decides what level of discipline to impose. She can recommend to the Principal to send the teacher home, is necessary.

23. As Dean, Ms. Roeder does not prepare or sign off evaluations that would placed in personnel files. She does not issue discipline that would be placed in personnel files and she does not recommend suspension or discharge.

24. The District decided to change its organizational structure by creating 6 Director positions because the District believed that it needed more employees and employee time to evaluate and discipline Teachers, to direct Teachers concerning curriculum and performance, and otherwise supervise Teachers, to perform administrative functions, and to ensure curriculum and program consistency across grade levels in the District. See Stipulated Facts at 20 and Union Exhibit 5.

25. At the January 17, 2014 School Board Public Hearing on the Budget, the District Superintendent spoke about the "curriculum realignment":

> There are 6 dean positions exclusively working at WHS [Windham High School] servicing curriculum needs and assisting with development and integration of curriculum in the classroom. The district looked at the needs in the future and decided to take a 2-step approach to expand and realign the positions. *Using the existing positions, the proposal is to change teacher positions to administrative positions.* The teacher component would remain and be expanded to middle school which would make them directors in grades 6-12. The Dean of Guidance would be the Director of Guidance for grades K-12. A Guidance Director is required for 10 or more guidance counselors.
>
> *All director positions essentially will be year round and they would be removed from the teachers contract* (WEA). The cost of this is in the budget. Administration is not making assumptions people in the positions would apply or be hired so the cost presented is in the outer range. If you looked at the assumption that the current people would be elected for the new positions the cost would be significantly smaller, about $20-$30k, but the district has to account for that to be an open process.
>
> The objective of the change is to integrate the services to support administratively the principals and assistant principals in the middle and high school and continue on the path of vertical integration. The other important piece is administrative support for initiatives that come from the state level and the district looking at principal and teacher effectiveness. It was explained additional support for supervision and administrative support to teachers will put the district in a better position for the years to come and will help continue on the path the school district has embarked on with high quality instruction. *The district is looking at using current and existing resources rather than expanding and creating new positions.*

See Union Exhibit 5 (emphasis added).

26. In March, 2014 the District approved new job descriptions for the positions of Director of Guidance: K-12; Director of Science: Grades 6-12; and Director of Fine Arts: K-12. All of them set forth the contract period of 210 days and required a Master's Degree in appropriate field with administrative or supervisory experience preferred and a NH certification in specific subject or as a Guidance Director or Counselor "and Administrative certificate (or in process)." See Union Exhibits 8 A-C (incorporated in full by reference into the Findings of Fact).

27. On April 5, 2014, a day after the Association filed its complaint, the Superintendent approved new job descriptions for the positions of Director of Mathematics: Grades 6-12; Director of Sciences: Grades 6-12; Director of Fine Arts: K-12; and Director of Guidance: K-12. See District Exhibits 4A-4D.

28. The April 5, 2014 Job Description for the Director of Mathematics provides in part as follows:

Contract Period:	11 months, 210 days, exempt
Reports to:	Director of Curriculum, Instruction and Assessment [CIA] or designee
Supervises:	Grades 6-12 Mathematics and Business staff
Position Goal:	The Director of Mathematics will coordinate, supervise, and offer support to the mathematics teachers in grades 6-12 of the Windham School District. This position will assist the district CIA Director in developing, administering, and implementing with fidelity mathematics curriculum.
...	
Qualifications:	*Master's Degree in Education* or equivalent Administrative or supervisory experience preferred
Experience:	Minimum of five years of successful experience as a mathematics teacher or instructor in a similar field.

Licensure/Certification Requirements:

NH Certified as a Mathematics Teacher 5-12 and Administrative certificate completed (or in process)

Evaluation: Performance of position responsibilities will be evaluated annually in accordance with the approved administrative procedure for staff evaluation

Other Considerations and Requirements:

...

Such alternatives to the above qualifications as the Superintendent may find appropriate and acceptable

General Duties, at the discretion of the District, may include:

1. Oversee operation of the grades 6-12 mathematics and business curriculum and instruction in collaboration with the building administrators and Director of CIA
2. Participates and facilities [sic] faculty staff department meetings
3. Work closely with building principals to ensure the successful scheduling of appropriate mathematics and business related course offerings as it relates to the master schedule
4. Supervise and evaluate grades 6-12 mathematics and business teachers and support staff. Due to the number of employees to be evaluated, the Director will evaluate some or all such employees, but the building principal may evaluate some of them. Place such employees on improvement plans and monitor their progress, as needed
5. Implements comprehensive grades 6-12 mathematics and business programming for all students
6. May be required to carry a course load of 2 classes per semester
7. Actively participate in the mathematics and business budget process
8. Assist with staff professional development in the content area
9. Serve and lead committees as needed/assigned
10. Reprimand grades 6-12 mathematics and business teachers and support staff, as needed. Recommend suspensions, dismissals and non-renewals of such employees to the building administrator and/or superintendent, as needed
11. Perform other tasks and assume other responsibilities as assigned by the building administrator, Director of CIA, or Superintendent
12. Recruit grades 6-12 mathematics and business teachers and support staff, and recommend hiring of such employees to the building administrator and superintendent

...

See District Exhibit 4A (emphasis added). The April 15, 2014 Job Descriptions for Director of Sciences (Grades 6-12), and Director of Fine Arts (K-12) set forth the same contract period (210 days) and contain substantially similar qualification, experience, and certification requirements, and performance responsibilities. See School District Exhibits 4B and 4C (incorporated by reference in full into the Findings of Fact).

29. Under the April 15, 2014 Job Description, the contract period for the Director of Guidance is 260 days; the Director reports to the Director of Student Services and "supervises" K-12 guidance staff. The candidate for the position is required to hold Master's Degree in the Counseling, Mental Health or related field and Masters/CAGS in Leadership. Administrative or supervisory experience is preferred but not required. The Job Description provides that the

candidate must be "*NH Certified as a Director of Guidance* (or Guidance Counselor with director certification in process)" (emphasis added). The Director of Guidance responsibilities include, among others, the following: "oversee operation of the K-12 Guidance Program"; participate in faculty staff department meetings; "[s]upervise and evaluate grades K-12 guidance counselors and guidance support staff"; place "employees on performance improvement plans and monitor their progress, as needed"; create, maintain, and manage the guidance budget in all schools; "[r]eprimand grades K-12 guidance counselors and guidance support staff, as needed"; "[r]ecommend suspensions, dismissals and non-renewals of such employees to the building administrator and/or superintendent, as needed"; "[r]ecruit grades K-12 guidance counselors and guidance support staff and recommend hiring of such employees to the building administrator and superintendent"; and co-facilitate the master scheduling process with the Principal for grades 9-12. The job description provides that "[d]ue to the number of employees to be evaluated, the Director will evaluate some or all such employees, but the building principal may evaluate some of them." See District Exhibit 4D (incorporate by reference into the Findings of Fact).

30. The Director of Fine Arts, per the relevant job description, will teach up to 2 periods per day at grades 9-12, will have planning time of approximately 2.5 hours per week, and will perform Director functions at grades K-12 the remainder of the time, starting in 2014-15. See Stipulated Facts at 12.

31. The Director of Guidance, per the relevant job description, will not teach, will be responsible as a guidance counselor for a reduced student caseload at grades 9-12 for up to the equivalent of 2 periods per day, will have planning time of approximately 2.5 hours per week, and will perform Director functions at grades K-12 the remainder of the time, starting in 2014-15. See Stipulated Facts at 13.

32. The Directors of Mathematics and Science, per the relevant job description, will teach up to 2 periods per day at grades 6-12, will have planning time of approximately 2.5 hours

per week, and will perform director functions at grades 6-12 the remainder of the time, starting in 2014-15. See Stipulated Facts at 14.

33. The Director of Guidance, per the relevant job description, will be employed on a year-round (260-day) contract. The other Directors will be employed on 210-day contracts. See Stipulated Facts at 16.

34. Catherine Croteau signed the Administrator Employment Agreement (AEA) for the position of Director of Mathematics on May 16, 2014 and Bethany Bernasconi signed an AEA for the position of Director of Sciences on May 9, 2014. Jared Cassidy signed an AEA for the position of Director of Fine Arts on May 8, 2014; and Julie Lichtmann singed an AEA for the position of Director of Guidance on May 9, 2014. Each AEA sets out benefits in Appendix A, including the following: medical, dental, life, and long term disability insurance, longevity, holiday, vacation, sick and other leave, salary increases, and retirement severance. See District Exhibits 5A-5D.

35. The District currently does not plan to fill Dean positions after corresponding Director positions are created and does not anticipate that change in organizational structure will create Department Head positions at the High School. See Stipulated Facts at 17 & 19.

36. For 2014-15, the Directors of Fine Arts, Guidance and Science will be the same employees who served as Teacher-Deans of Music, Guidance, and Science. The Director of Mathematics will be a different employee than the Teacher-Dean of Mathematics because the Teacher-Dean of Mathematics opted not to apply for the Director of Mathematics position. See Stipulated Facts at 19.

37. The School District plans to appoint the Directors of Language Arts and Social Studies in the spring, 2015. See Stipulated Facts at 21.

38. The District anticipates that for the 2015-16 school year, Directors of Language Arts and Social Studies will teach up to 2 periods per day at grades 6-12, will have planning time

of approximately 2.5 hours per week, and will perform Director functions the remainder of the time. See Stipulated Facts at 15.

39. Dean Roeder believes that 100% of Deans' duties will be performed by Directors, including budgeting, hiring, interviewing, mentoring, scheduling, and feedback on teachers' performance.

40. According to the District, in 2014-15, the Director of Guidance will "supervise" 11 employees; the Director of Fine Arts – 12 employees; the Director of Math/Business – 16 employees; and the Director of Science – 15 employees. See District Exhibit 6.

41. The Association demanded that the District negotiate over the removal of bargaining unit work from the unit. The District refused to negotiate or discuss its decision to implement the changes. On April 23, 2014 the District's Representative Attorney Michael Elwell sent the following communication to the Association's Representative Attorney James Allmendinger:

> … [T]he School District's position based upon the statute and the case law is that it is the District's managerial prerogative to change its organizational structure, even if the new director positions will perform some bargaining unit work, but the District must negotiate over the impact of the reorganization if the Association wishes to negotiate over the impact. The School District has offered orally to negotiate over impact, and I reiterated the School District's willingness to do so during our conversation yesterday.
>
> Please contact me if the Association wishes to engage in impact bargaining.

See District Exhibit 7. The Association decided not to engage in impact bargaining because it believed that the District must negotiate its decision to remove bargaining unit work from the bargaining unit.

Decision and Order

Decision Summary:

The District committed an unfair labor practice when it unilaterally removed subject positions from the existing bargaining unit. Under both the PELRB certification and the Recognition clause of the parties' CBA, the bargaining unit includes "all certificated staff" of the

District and the only positions excluded from the unit are those of Superintendents, Assistant Superintendents, Principals, Assistant Principals, Title I Teachers, Literacy Success and ESOL Teachers. The subject positions, whether they are modified existing positions or newly created positions, are teaching/guidance positions requiring NH State certification and, therefore, fall within the definition of the "certificated staff" and are not specifically excluded from the unit. Accordingly, these positions can be removed from the existing bargaining unit only through the utilization of the Pub 302.05 modification procedure; and until and unless these positions are removed pursuant to the modification procedure, the District is required to negotiate any changes in terms and conditions of employment, including, among others, such terms and conditions as wages, length of the work year, number of hours, work locations, and benefits.

Jurisdiction:

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

Discussion:

The Association claims that the District violated RSA 273-A:5, I (a), (e) and (g)[1] when, among other things, it refused to negotiate with the Association its decision to change the duties of Deans and to remove bargaining unit work from the bargaining unit. The Association asserts, among other things, that the Director positions are substantially similar to the Dean positions and should be included in the bargaining unit.

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.[2] See also *Prof. Fire*

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[1] RSA 273-A:5, I provides in relevant part:

> 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 ... (g) To fail to comply with this chapter or nay rule adopted under this chapter...

[2] "The 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.

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). Although the PELRB has "discretion to redetermine the composition of bargaining units," established "expectations in collective bargaining should not be casually altered ..." See *Appeal of the Bow School District*, 134 N.H. 64, 67, 71 (1991). Moreover,

> 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 *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). See also *Appeal of Somersworth*, 142 N.H. 837, 841 (1998). Modifications or rederminations of existing bargaining units, including removal of positions, 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) ("[A]n administrative agency must follow its own rules and regulations...").

Furthermore, in *State Employees' Association of New Hampshire, SEIU Local 1984 and State of New Hampshire*, PELRB Decision No. 2013-079, the PELRB held that the public employer cannot unilaterally declare employees to be confidential thereby removing them from the bargaining unit. The Board stated:

> Under the legislative and administrative rule framework reflected in RSA 273-A et. seq. and N.H. Admin. Rule Pub 100-300, the PELRB is charged with the determination of bargaining units. This means the PELRB is responsible for resolving bargaining unit composition issues (which positions will be included or excluded from a proposed bargaining unit) through the adjudicatory hearing process as necessary...
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> ...
>
> We are not convinced that the State, or any other public employer, enjoys the right to unilaterally remove individual employees from a bargaining unit (and therefore coverage under any collective bargaining agreement and RSA 273-A) by a "confidential" employee designation, even on a temporary basis. First, such public employer unilateral

> action is not expressly authorized or otherwise sanctioned by the Act or the administrative rules. Second, the PELRB's general jurisdiction over bargaining unit composition issues is not diminished when questions arise as to the confidential status of a particular position or employee during the time period subsequent to the date of the initial certification. In other words, there is nothing in the Act or the administrative rules that shifts the authority to determine bargaining unit composition issues, in whole or in part, from the PELRB to the public employer once the PELRB has determined the original bargaining unit. Third, a public employer's managerial prerogative is subject to the express authority of the PELRB to administer the provisions of the Act, which authority includes the exclusive power to determine bargaining units and resolve disputes concerning the composition of proposed bargaining units and previously approved bargaining units. Neither the State's nor any other public employer's managerial power is so great that it includes the authority to usurp the jurisdiction of the PELRB in these areas. We appreciate the State's desire to control the application of RSA 273-A:1, IX to its employees, at least on a temporary basis... But, we find this interpretation of management rights goes too far because it conflicts with express statutory provisions (RSA 273-A:8) and administrative rules (Pub 302.05 and Pub 206.01), as well as the general framework of the Act, that vests the PELRB, and not public employers, with authority over such matters. There are sufficient PELRB procedural options in place pursuant to which the PELRB can determine bargaining unit issues like the confidential status of bargaining unit employees.

In this case, the Dean positions are undisputedly within the bargaining unit represented by the Association. The record shows that the District unilaterally added the duties and responsibilities and changed terms and conditions of employment, including wages, hours, benefits, and work locations, for these positions, allegedly to create new positions (Directors). See Findings of Fact at 25 ("*Using the existing positions, the proposal is to change teacher positions to administrative positions ... All director positions essentially will be year round and they would be removed from the teachers contract (WEA)[Association]... The district is looking at using current and existing resources rather than expanding and creating new positions*"). The District argues, among other things, that the addition of administrative duties transformed the positions into supervisory non-bargaining unit positions. The District's actions here are similar to the State's actions in *State Employees' Association of New Hampshire, SEIU Local 1984 and State of New Hampshire,* supra, PELRB Decision No. 2013-079, and are tantamount to the unilateral removal of positions from the certified bargaining unit. Like in *State Employees'*

Association case, the District here cannot unilaterally declare bargaining unit employees to be supervisory and remove them from the bargaining unit.

In addition, in support of its claim that the Director positions are new positions that are different from the former Dean positions, the District asserts, among other thing, that the Director positions have different salary, different working hours/year, and will encompass more school locations. Such assertion is unpersuasive as the changes to wages, hours, length of a work year, and work locations are changes to the terms and conditions of employment that must be negotiated. See RSA 273-A:1, XI.[3] Here, the District's "unilateral change in a term or condition of employment . . . is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations"; see *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999); and is therefore a violation of RSA 273-A:5, I (e) and (g). See RSA 273-A:3 ("[i]t is the obligation of the public employer and the employee organization ... to negotiate in good faith.")

Furthermore, even if the Director positions were, as District argues, newly-created positions, these positions would still be included in the bargaining unit under both the PELRB certification and the parties' CBA. Under the PELRB certification, the bargaining unit includes "all certificated staff" employed by the District and the only positions excluded from the unit are those of Superintendents, Assistant Superintendents, Principals, Assistant Principals, Title I Teachers, Literacy Success and ESOL Teachers. The Recognition clause of the parties' CBA provides that the term "'teacher' as used in this Agreement shall mean a professional employee of the Windham School District whose position requires certification by the State Board of

[3] RSA 273-A:1, XI defines "terms and conditions of employment" as follows:

> 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.

Education as a professional." The Director positions fall within the definition of the "certificated staff" as, under the new, as well as old, job descriptions, all Directors are required to be certified as teachers, or a director of guidance/guidance counselor, and all are required to hold a Master's or other advanced degree.[4]

Therefore, the subject positions, whether they are modified existing Dean positions or newly created Director positions, are professional teaching/guidance positions requiring NH State certification that fall within the definition of the "certificated staff" and are not specifically excluded from the bargaining unit. Accordingly, these positions can only be removed from the existing bargaining unit through the utilization of the Pub 302.05 modification procedure; and until and unless these positions are removed pursuant to Pub 302.05, the District is required to negotiate any changes in terms and conditions of employment, including, among others, such terms and conditions as wages, length of the work year, number of hours, work locations, and benefits.

For the foregoing reasons, the District committed an unfair labor practice in violation of RSA 273-A: 5, I (e) and (g) when it unilaterally removed bargaining unit positions from the unit and unilaterally modified the terms and conditions of employment for bargaining unit positions. The evidence is insufficient to prove that the District violated RSA 273-A: 5, I (a) and this claim is, therefore, dismissed. The District shall cease and desist from refusing to negotiate terms and conditions of employment for Dean and/or Director positions.

So ordered.

October 14, 2014

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[4] "'Professional employee' means any employee engaged in work predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment, and requiring knowledge in a discipline customarily acquired in a formal program of advanced study." RSA 273-A:1, VIII.