



State of New Hampshire
Public Employee Labor Relations Board

Derry Education Association/NEA-NH

and

Derry School District

Case No. E-0073-6

Decision No. 2024-151

Appearances: Ignacio Sanchez, UniServ Director, NEA-NH, Concord, NH, for the Petitioner

Michael Elwell, Esq. Soule Leslie Kidder, Sayward & Loughman, Salem, NH, for the Respondent

Background:

On February 20, 2024, the Derry Education Association/NEA-NH (Association) filed a modification petition pursuant to N.H. Admin. Rule Pub 302.05 seeking to add the positions of Math Interventionist, Out of District Coordinator, and Science Coach/Specialist (Science Specialist) to the existing bargaining unit set forth in PELRB Decision No. 2023-124 (June 9, 2023). See also PELRB Certification of Representative and Order to Negotiate, Case No. M-0621 (February 5, 1990).

The District objects to adding the Science Specialist and Out of District Coordinator positions to the bargaining unit for the following reasons: (1) the petition violated Admin. Rule Pub 302.05 in that there have been no changes in circumstances and the unit is not incorrect to the degree warranting modification; (2) the Out of District Coordinator and the Science Specialist lack a community of interest with other employees in the existing bargaining unit; (3) the Out of District Coordinator and the Science Specialist are irregular employee within the meaning of RSA 273-

A:1, IX (d); and (4) adding the Out of District Coordinator and the Science Specialist to the unit will adversely affect the efficiency of the District's operations and will create a potential for a division of loyalties. A hearing was held on May 23, 2024. 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 1, 2024, 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 Association was originally elected and certified as the exclusive representative of the bargaining unit in 1977. At that time, the unit composition was as follows: All teachers, guidance counselors, speech therapists, librarians, and school nurses. See PELRB Certification of Representative and Order to Negotiate, Case No. T-0223 (June 17, 1977). This unit was not “grandfathered” under Laws 1975, 490:3 “grandfather” clause.¹
3. On December 2, 2002, the Association filed a modification petition seeking to change the bargaining unit description to “all professional employees” and to add positions of occupational therapist, physical therapist, speech language therapist, certified occupational therapy assistant, and physical therapy assistant to the unit. See PELRB Decision No. 2003-021 (March 19, 2003). The District objected to the inclusion of certified occupational therapy assistants and physical therapy assistants to the unit and to the change of the unit description to “all professional employees.” After a hearing, the PELRB modified the following bargaining unit description as follows: All Teachers, Guidance Counselors, Speech Therapists, Librarians, School Nurses, Occupational Therapists, Physical Therapists, Speech Language Pathologist, Occupational Therapy Assistant, and Physical Therapy Assistant. See PELRB Decision No. 2003-022 (March

¹ See *State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board*, 116 N.H. 653 (1976).

20, 2003). See also PELRB Decision Nos. 2003-021, 2003-049, and 2003-079.

4. In 2011, the Association filed an agreed upon petition for modification seeking to update the bargaining unit description to reflect the changes to the parties' 2010-2012 CBA recognition clause. The PELRB granted the petition. See PELRB Decision No. 2011-267 (October 31, 2011).

5. In 2016, the Association filed an agreed upon petition for modification seeking to add the position of Specialist in Assessment of Intellectual Functioning (SAIF) to the bargaining unit. The petition was granted. See PELRB Decision No. 2016-088 (March 27, 2016)

6. In 2023, the Association filed a modification petition seeking to add the position of Home to School Coordinator to the bargaining unit. The District objected to the petition. However, the parties eventually resolved the dispute by agreeing to add Home to School Coordinators to the unit; to add Pre-School Coordinator to the exclusions; and to change changing the Chief Psychologist position title in Exclusions to Psychologist Coordinator. See PELRB Decision No. 2023-123. The modification petition was granted. See PELRB Decision No. 2023-124 (June 9, 2023).

7. Based upon the most recent (2023) modification proceedings, the Association is the certified exclusive representative for the following bargaining unit:

Unit: Teachers, Guidance Counselors, Speech Therapists, Librarians, School Nurses, Occupational Therapists, Physical Therapists, Speech Language Pathologists, School Psychologists, Specialist in Assessment of Intellectual Functioning (SAIF), Occupational Therapy Assistants, Physical Therapy Assistants, and Home to School Coordinators.

Excluded: The Superintendent, Assistant Superintendent, Principals, full-time Assistant Principals, Directors, Psychologist Coordinator, Pre-School Coordinator, and all professional employees.

See PELRB Decision No. 2023-124 (June 9, 2023). No other modification petitions have been filed between June 9, 2023 and the current petition.

8. In the present case, the Association has petitioned the PELRB to modify the bargaining unit by adding the positions of Math Interventionist, Science Specialist and Out of District Coordinator to the bargaining unit.

9. The District does not object to including Math Interventionists in the bargaining unit.

10. The Association and the District are parties to a collective bargaining agreement (CBA) effective from July 1, 2022 through June 30, 2025 (2022-25 CBA). See Association Exhibit 12.

11. The negotiations on the 2022-25 CBA took place in late 2021. During those negotiations, the parties negotiated changes to the composition of the bargaining unit. They agreed to exclude the pre-school coordinator and to change the exclusion of chief psychologist to exclusion of psychologist coordinator. The Association also proposed to add the home to school coordinator to the bargaining unit, but the District did not agree, and the Association withdrew that proposal. See Levesque and Kennedy testimony; District Exhibit 28.

12. CBA Article 1, titled Recognition Clause, provides as follows:

1-01 The Derry School Board (hereinafter called the "Board") recognizes the Derry Education Association (hereinafter called the "Association") as the exclusive representative for purposes of collective bargaining for a unit composed of teachers, guidance counselors, speech therapists, librarians, school nurses, occupational therapists, physical therapists, speech language pathologists, school psychologists, specialists in assessment of intellectual functioning (SAIF), occupational therapy assistants and physical therapy assistants.

1-02 Specifically excluded from the unit are the Superintendent, Assistant Superintendents, Principals, full-time Assistant Principals, Directors, Psychologist Coordinator, Pre-school Coordinator, and all nonprofessional employees.

1-03 The words "teacher" or "teachers" shall, as used in this Agreement, be defined as including all members of the bargaining unit. Part-time employees in bargaining unit positions who work at least half-time will receive benefits which are prorated in accordance with the number of days and hours worked.

See Association Exhibit 12.

13. Article 10-2 provides in part as follows:

10—02 Notwithstanding any other provisions in this Agreement, the Board has sole jurisdiction, authority and discretion to contract with individuals, companies or agencies to provide services that otherwise would be provided by persons employed in this bargaining unit if the Superintendent determines that he cannot fill the position at the applicable salary with a qualified applicant. The Board will not contract-out for teacher, librarian or guidance counselor services.

See Association Exhibit 12.

14. The position of Out of District Coordinator has existed since 2003. Initially, this position was filled by an independent contractor. During the 2019-20 school year, this position was split between two District non-bargaining unit employees and one independent contractor (Kayla D'Orio). The District contracted with Kayla DiOrio as a "Vendor" or "Consultant" i.e. independent contractor, performing the Out of District Special Education Coordinator's responsibilities for school years 2019-20 and 2020-21.

15. During the 2020-21 school year, this position was split between same two District employees and a new independent contractor, Paul Butler.

16. During the 2021-22 school year, Paul Butler was working in the Out of District Coordinator position as the District employee, not an independent contractor.

17. For the school years 2022-23 and 2023-24, the District hired Alison Rice as an Out of District Coordinator. On the 2022 and 2023 letters of agreement, she was identified as an "employee" of the District not as a "vendor" or "consultant." See Association Exhibit 6, pp 1 & 2. Per the 2022-23 agreement, her "scheduled hours" were "Up to 20 hrs/week."

18. Ms. Rice's 2023-24 agreement provides in part as follows:

2. Subject to paragraph 3, the Employee will receive the following compensation (less any deductions required by Federal or State law, proper deductions for loss of time, and other deductions agreed by the parties and authorized in writing by the Employee):

Note: Employee to work up to 40 hours per week. District will pay 20 hours and the additional hours, up to maximum of 20 hours will be paid through federal funding of the position.

Note: Start date REVISED 3/1/2023

Hourly Rate: \$40.00

First payroll date: March 17, 2023

Scheduled Hours Per Day: Up to 40 Hrs/wk

Days Per Year: School Year— Timeslip dictates payment...

Association Exhibit 6 (emphasis in original).

19. There is no job description for the position of Out of District Coordinator. Among other things, the Out of District Coordinator is responsible for the individual education plans of Derry students attending out of district programs/placements and serves as the District's representative for the out of district special education placements, including private schools, nursing homes, and charter schools. The Out of District Coordinator responsibilities include communication with community agencies including but not limited to the DCYF, Court, and other federal and state agencies, and the completion and submission of monthly reports as directed by the Director of Student Services. See Association Exhibit 5 & 8. This position requires a lot of traveling and irregular working hours, including working during New Hampshire school break periods, nights, and weekends. As part of her responsibilities, the Out of District Coordinator travels to at least 19 different buildings located in New Hampshire, Massachusetts, Connecticut, Vermont, and other states. When not traveling, the Out of District Coordinator works out of the SAU office or home. The Out of District Coordinator does not provide instructions to students.

20. Association Vice President David Levesque was the Association's Chief negotiator during the 2021 negotiations on the current CBA and was involved in 2023 unit modification process. According to Mr. Levesque, he knew that the Out of District Coordinator position existed at the time the 2023 petition was filed but he believed it was an "administrative position" not eligible for inclusion in the unit.

21. There have been no changes to the Out of District Coordinator's duties and/or responsibilities since the 2023 modification proceedings.

22. The position of Science Specialist (part time) has existed in the District since at least 2022. When this position was created, it was contingent upon the Covid-related ESSER (Elementary and Second School Emergency Relief) funds. See District Exhibit 2. Angela Barber was employed in this position in school years 2022-23 and 2023-24. Her agreement with the District for year 2023-24, made on April 14, 2023, states that her position is contingent on ESSER funding. See District Exhibit 23.

23. According to President Margaret Morse-Barry, the Association did not add this position to its 2023 modification petition because this position was ESSER-funded.

24. The Science Specialist job description provides in part that "[i]n collaboration with the Assistant Superintendent and other curriculum leaders, the Science Specialist will provide teachers with tools to aid in instruction and assessment. The Science Specialist works with educators to ensure an effective and consistent Science curriculum." The job responsibilities include the following:

- Review and analyze district science assessment data, including the state assessment, to identify trends and support instructional goals
- Share identified data trends with educators to support planning and goal setting for science curriculum and instruction
- Participate in Science Committee, science department and/or grade level meetings as necessary
- Provide science-related professional learning opportunities for teachers
- Create/obtain research-based science resources for teachers
- Collaborate and meet regularly with curriculum administrators to identify curricular and instructional goals in science.

See District Exhibit 2. The Science Specialist does not work directly with students.

25. Due to the recent District reorganization, the Science Specialist position became partly ESSER-funded and partly District-funded during the 2023-24 school year and the 2023

budget process. In the school year 2024-25, this position will be fully-funded by the District.

26. There have been no changes to the Science Specialist's duties and/or responsibilities since the 2023 modification proceedings.

Decision and Order

Decision Summary:

The position of Math Interventionist is added to the bargaining unit by agreement. The Association's request to add the positions of Out of District Coordinator and Science Coach/Specialist is denied because the evidence is insufficient to prove that there has been a change in circumstances since the bargaining unit was last modified in 2023, as required under Admin. Rule Pub 302.05.

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 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:

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.

- (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.

*Id.*³ The language of Admin. Rule Pub 302.05 leaves the PELRB discretion in deciding whether or not to grant petitions to modify. See *Appeal of the Bow School District*, 134 N.H. 64, 73 (1991).

In accordance with Admin. Rule Pub 302.05 (a), the threshold consideration in this case is whether the Association has met its burden of proving by a preponderance of the evidence that a change in circumstances has occurred since the bargaining unit was last modified. 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).

Examples of a change in circumstances that may warrant modification of a bargaining unit include the creation of a new position,⁴ a modification of a job description/duties,⁵ and an increase in working hours resulting in a material change in the nature of the position (e.g. an increase in daily contact with students, teachers and parents sufficient to permit a school nurse to be included

³ “[T]he ‘prior unit’ language in the rule means one which is ‘grandfathered’ because it was in existence at the time RSA 273-A became law in 1975.” See *Hudson School District and AFSCME Council 93, Local 1906, AFL-CIO*, PELRB Decision No. 2024-054 (April 10, 2024). As this case involves a bargaining unit that was certified through the election process and was not grandfathered, this portion of the rule does not apply here. Further, the Association did not argue or prove that the unit here was incorrect “to the degree of warranting modification.”

⁴See *New Hampshire Retirement System and State Employees Association of New Hampshire, Inc., SEIU Local 1984*, PELRB Decision No. 2013-262 (June 30, 2015), rev’d on other grounds, *Appeal of New Hampshire Retirement System*, 167 N.H. 685 (2015). See also *Town of Gilford and AFSCME Council 93, Local 534, Gilford Public Works Employees*, PELRB Decision No. 2015-196 (August 31, 2015).

⁵*Windham School District, SAU #95 and Windham Education Association, Affiliated with NHEA/NEA*, PELRB Decision No. 2015-148 (June 30, 2015). See also *Freedom School Employees Association, NEA-NH and Freedom School District*, PELRB Decision No. 2008-207 (October 13, 2008).

in the teachers' bargaining unit because it intensified the community of interest between the school nurses and the teachers.⁶⁾

In *Rochester Municipal Managers Group and City of Rochester*, supra, PELRB Decision No. 2009-182, the union petitioned to modify the recently certified bargaining unit by adding a communications supervisor position. This position existed and was filled at the time the unit was certified. *Id.* The communications supervisor position was not included in the previous certification petition due to an oversight and the only change since the issuance of the certification was the change in the employee's status from probationary to permanent. *Id.* The Union's petition was dismissed on the grounds that the change in the employee's status from probationary to permanent was not a change in circumstances warranting modification and that the correction of an oversight or a mistake was not a sufficient ground for filing a modification petition. *Id.*

Similarly, in *Salem Public Administrators' Association and Town of Salem*, supra, PELRB Decision No. 2009-171, the union's modification petition was denied because there was insufficient evidence that there had been a change in circumstances since the most recent proceedings were completed or that the current composition of the bargaining unit was incorrect to the degree warranting modification. In *Salem*, the most recent unit-related proceedings concluded in 2007, two years prior to the filing of the modification petition when the parties' agreement on unit composition was accepted and approved by the PELRB. See *id.* In its 2009 modification petition, the union claimed that six previously-excluded positions should be added to the unit because the Town failed to make progress on individual employment agreements with six employees. The PELRB found that "[t]he evidence concerning the Town's failure to make progress to the [Union's] satisfaction on individual employment agreements with some or all of

⁶*Appeal of Bow School District*, supra, 134 N.H. at 73.

the employees holding the six positions excluded from the bargaining unit in 2007 is not a change in circumstance which justifies these modification proceedings.” *Id.* See also *Teamsters Local 633 of New Hampshire and Town of Hooksett*, PELRB Decision No. 2008-193 (dismissing modification petition because there had been no change in circumstances since prior bargaining unit proceedings); *Lebanon Support Staff Association, NEA-New Hampshire and Lebanon School District*, PELRB Decision No. 2004-005 (January 12, 2004) (denying modification petition because there had been no change in circumstances relative to formation of bargaining unit since negotiations on most recent CBA); *Keene Police Officer’s Association, NHFT, AFT, AFL-CIO and City of Keene*, supra, PELRB Decision No. 2004-077 (denying modification petition because there was insufficient evidence of change in circumstances).

Conversely, in *Appeal of the Bow School District*, supra, 134 N.H. 64, at 72, the Supreme Court affirmed the PELRB decision allowing the school nurses to be added to the existing teachers' bargaining unit. In *Bow*, the changes in circumstances included an increase in nurses' working hours and in contact with students. The Court found that these changes increased nurses' community of interest with teachers and, thereby, justified the modification of the bargaining unit. See *id.*

In this case, the evidence is insufficient to prove that a change in circumstances warranting modification of a bargaining unit has occurred since the unit was last modified. The position of Out of District Coordinator has existed since 2003 albeit initially it was filled by independent contractors sharing their duties with two District non-bargaining unit employees. This position was filled by a District employee, not an independent contractor, since at least 2021, a two years prior to the filing of the 2023 modification petition. The Association claims that this position was not included in its 2023 modification petition because the Association was under the impression that this position was administrative and, therefore, ineligible for inclusion in the unit. This assertion

does not prove that the circumstances involving this position have changed since the 2023 modification proceedings. Here, as in *Rochester*, the correction of an oversight or a mistake is not a sufficient ground for filing a modification petition. See *Rochester Municipal Managers Group and City of Rochester*, supra, PELRB Decision No. 2009-182.

Similarly, the position of Science Specialist has existed and was filled since at least 2022, i.e., prior to filing of the 2023 modification petition. Unlike in *Bow*, here, the only circumstance that has changed since the creation of the position is the source of its finding. It is unclear if the source of finding has changed prior or after the 2023 modification proceedings. However, in any case, the source of finding is not relevant to the determination of whether a position is eligible for the inclusion in the bargaining unit. See RSA 273-A:1, IX (d).⁷ Therefore, the evidence is insufficient to prove that the circumstances related to this position have changed to warrant its addition to the unit.

For the foregoing reasons, the Association has failed to prove the existence of a change in circumstances to justify the addition of Out of District Coordinator and Science Specialist positions to the bargaining unit at this time. Accordingly, the Association's request to add these positions is denied.⁸ The Association's agreed upon request to add the position of Math Interventionist is granted. Accordingly, a unit modification order shall be issued, and the modified bargaining unit description is as follows:

Unit: Teachers, Guidance Counselors, Speech Therapists, Librarians, School Nurses, Occupational Therapists, Physical Therapists, Speech Language Pathologists, School Psychologists, Specialist in Assessment of Intellectual

⁷RSA 273-A:1, IX (d) provides as follows: "'Public employee' means any person employed by a public employer except... Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, *nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.*" (Emphasis added.)

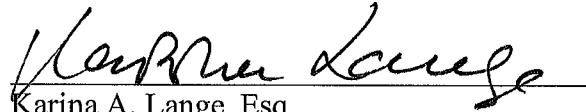
⁸Because the Association's request to add these positions is denied pursuant to Admin. Rule Pub. 302.05, it is unnecessary to address the other objections raised by the District.

Functioning (SAIF), Occupational Therapy Assistants, Physical Therapy Assistants, Home to School Coordinators, and Math Interventionist.

Excluded: The Superintendent, Assistant Superintendent, Principals, full-time Assistant Principals, Directors, Psychologist Coordinator, Pre-School Coordinator, and all professional employees.

So ordered.

Date: 07/30/2024



Karina A. Lange, Esq.
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