



Appeal to NH Supreme Court dismissed on July 31, 1995, NH Supreme Court Case No. 94-376.

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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LONDONDERRY EDUCATION		:	
ASSOCIATION, NEA-NEW HAMPSHIRE		:	
	Complainant	:	CASE NO. T-0262:6
	v.	:	DECISION NO. 94-18
LONDONDERRY SCHOOL DISTRICT		:	
	Respondent	:	
_____		:	

APPEARANCES

Representing Londonderry Education Assoc. NEA-NH:

Greg Andruschkevich, UniServ Director

Representing Londonderry School District:

Robert Leslie, Esq.

Also Appearing:

Peter A. Malley, Londonderry Education Association  
Craig Young, Londonderry School District  
Jane Marrayat, Londonderry Education Association

BACKGROUND

The Londonderry Education Association, NEA-New Hampshire (Association) filed unfair labor practice (ULP) charges against the Londonderry School District (District) on July 6, 1993 alleging violations of RSA 273-A:5 I (a), (c), (e), (g), (h) and (i) as the result of unilateral changes to the in-school suspension program, namely changing it from a teaching position to a non-teaching position. The District filed its answer on July 19, 1993. This matter was heard by the PELRB on September 9, 1993 at which time the parties sought and received a sixty (60) day continuance. Decision No. 93-123. After the continuance failed to produce a settlement, this matter was set for additional hearing before the PELRB on February 1, 1994.

FINDINGS OF FACT

1. The Londonderry School District is a "public employer" within the meaning of RSA 273-A:1 X
2. The Londonderry Education Association is the duly certified bargaining agent for "all professionally certified personnel except superintendent, assistant superintendents, principals, assistant principals, directors, teacher consultants, business administrators, persons employed by the State Board of Education or teaching principals, teaching assistant principals who teach three periods or less per day or fifty percent or less time per week" employed by the District.
3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period July 1, 1991 through June 30, 1992 and extending "until a successor agreement has been properly negotiated." Joint Exhibit No. 1
4. On January 5, 1993, the Londonderry School Board (Board) voted to change coverage for the in-school suspension program at the junior high school from a teaching position, paid on-schedule under the CBA at \$31,390, to a non-teaching position, which would become part of a different bargaining unit represented by a different bargaining agent, funded at approximately \$12,000. Union Exhibit No. 10.
5. Since the 1983-84 school year until the conclusion of the 1992-93 school year, Peter Malley was employed by the District as the in-school suspension teacher at the junior high school. He was paid as a teacher with the appropriate credits for educational attainment and years of service under the various CBA's for the respective school years notwithstanding that he was not and has not been certified as a teacher by the New Hampshire Department of Education. He received the same normal, personal "Teacher Contract" from the District for each of the school years in question as did the certified teachers in the unit. Union Exhibit No. 2.
6. As in-school suspension teacher, Malley was responsible for his room, student contact, student discipline, obtaining academic assignments from other teachers, reviewing and assisting in the work product of in-school suspended students, and attending staff meetings. From 1984-85 forward, he also served in various extra-curricular positions (Intramural Director, Softball, Basketball, Newspaper Advisor and Faculty

Manager) and was compensated therefore in accordance with the CBA. Both his work as the in-school suspension teacher and in extra-curricular roles were subject to teacher evaluation procedures which were administered to Malley in the same manner as applied to other teachers. Union Exhibit No. 3. He received what he described as a satisfactory "tenure" evaluation after three years of service.

7. Malley discharged additional duties assigned to teachers such as bus duty, lab duty, hall duty and cafeteria duty. He participated in the same staff development program used by other teachers. Union Exhibit No. 4. He has been listed in the roster of teachers printed in the District's Annual Report from 1983 to 1992. Union Exhibit No. 5. Likewise, he received all benefits accorded to teachers under the various CBA's from 1983 to 1992, e.g., insurance benefits course reimbursement, guaranteed lunch periods, sick leave and personal days.
8. There is another in-school suspension position at the high school whose funding was neither reduced nor was it removed from the bargaining unit.
9. Notwithstanding Finding Nos. 5, 6 and 7, the District has asserted that Malley, as a non-certified teacher, and the junior high in-school suspension position are not covered by the contract and, resultingly, are not subject to the grievance procedure found therein.
10. Association President Jane Marray testified that "certified" personnel has been used and interpreted to extend beyond teachers, citing specifically certain occupational therapist and physical therapist positions. For example, the occupational therapist is not "certified" as a teacher but is paid under the CBA. Union Exhibit Nos. 8 and 9.
11. On January 26, 1993 Superintendent Ouillette wrote Malley indicating that the Board had eliminated the in-school suspension position at the junior high school. On March 31, 1993, Ouillette wrote Malley a non-renomination letter, assuring him that this action was not an adverse reflection on his service to the District. On May 12, 1993 the District posted an educational assistant (in-school suspension) job vacancy. Malley did not apply. On July 2, 1993, Malley wrote Ouillette stating that he had not been provided with reasons for his non-renewal or given the right to a hearing. On July 9, 1993, Ouillette wrote Malley, telling him he had no right to a hearing

because he did "not meet the legal definition of a 'teacher.'"

12. Article XIX of the CBA addresses reductions in force. It contemplates, among other things, decreases in staffing levels due to budget limitations and provides that "the effected classification will refer to those teachers assigned in the subject area(s) and in the grade levels designated to be reduced, regardless of certification."(Emphasis added) "In-school suspension" is not a listed subject area although other non-teaching titles (e.g. occupational therapist) are listed. Malley was not and has not been notified of any recall rights or other rights under Article XIX. Likewise, there is no evidence of compliance with Article XIX, paragraph F which provides that "the Association will have the right to be notified when a reduction in force is contemplated and to make recommendations..."

#### DECISION AND ORDER

First, we must conclude that the junior high in-school suspension position is in the bargaining unit and, therefore, covered by the CBA. Nine years of uncontroverted practices makes it impossible for us to reach any other decision when Malley not only has been given individual teacher contracts but also has enjoyed all the rights and benefits under the various CBA's. Additionally, he is not excluded from coverage under the CBA because of his not being certified as a teacher since there are other positions in the bargaining unit which are not certified teaching positions and, in turn, enjoy the benefits of the CBA, from compensation to benefits.

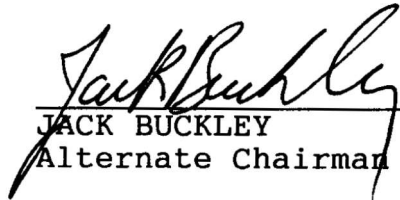
Second, because the in-school suspension position is in the bargaining unit and since we have found Malley to be covered by the CBA, the District breached the CBA when it failed to afford Malley rights under Article XIX or rights to a hearing. While we understand the Superintendent's position relative to a non-renewal hearing for an employee not certified under the laws of New Hampshire, we cannot countenance the inconsistency of nine years of treatment as a full-fledged teacher versus the denial of rights once the position was eliminated. The change-over to a para-professional position did nothing to Malley's status. He is/was as much a "teacher" within the meaning and usage of the CBA on January 6, 1993 as he was on January 4, 1993.

Third and thus, we find the District's breach of the CBA when it failed to accord the rights referenced in the previous paragraph to have been a violation of RSA 273-A:5 I (h) and its failure to adhere to Article XIX, paragraph F of the CBA to have been a

violation of RSA 273-A:5 I (h) as to the breach and of RSA 273-A:5 I (e) to the extent impact bargaining has not occurred. By way of remedy, we direct: (1) that the parties, or either of them, have a period of thirty (30) days from the date of this decision to proceed to binding grievance arbitration under Article V of the CBA over Malley's complaints of any breaches of the CBA as they pertain to the position elimination or contractual rights to which he feels he is entitled; (2) if any such grievance(s) is/are filed, all time limits shall be waived and the grievance(s) shall be considered to have been timely filed and processed, and (3) that the parties, by demand of one of them upon the other, proceed forthwith to impact bargaining over the elimination of the in-school suspension position.

So ordered.

Signed this 10th day of March, 1994.

  
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JACK BUCKLEY  
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding.  
Members Seymour Osman and E. Vincent Hall present and voting