

VERMONT LABOR RELATIONS BOARD

WOODSTOCK UNION HIGH SCHOOL	)	
TEACHERS ORGANIZATION,	)	
EDUCATIONAL SUPPORT	)	
PERSONNEL UNIT	)	
	)	DOCKET NO. 99-16
and	)	
	)	
WOODSTOCK UNION HIGH	)	
SCHOOL DISTRICT	)	

VERMONT LABOR RELATIONS BOARD

Statement of Case

On March 19, 1999, the Woodstock Union High School Teachers Organization, Educational Support Personnel Unit ("Union") filed a unit clarification petition, seeking to add the position of Job Placement Coordinator to the support staff bargaining unit represented by the Union. The Woodstock Union High School District ("Employer") filed a response in opposition to the petition on the grounds that: 1) the Coordinator does not share a sufficient community of interests with employees in the existing bargaining unit; and 2) the Coordinator is a professional employee.

A hearing was held before Labor Relations Board members Catherine Frank, Chairperson; Carroll Comstock and Edward Zuccaro on June 24, 1999. Attorney Dennis Wells represented the Employer. Vermont-NEA Organizer Ellen David Friedman represented the Union. Post-hearing briefs were due to be postmarked July 8, 1999. The Employer brief was post-marked in a timely manner, and was received by the Labor Relations Board on July 9, 1999. The Association brief was not post-marked until July 9, 1999, and has not been relied upon by the Board pursuant to Section 32.16 of Board Rules of Practice.

### FINDINGS OF FACT

1. On April 11, 1988, following a representation election, the Labor Relations Board certified the Union as the exclusive bargaining representative of the cafeteria workers, aides, custodians and secretaries of the Employer; excluding the Principal's Secretary/Supervisor of Secretaries, Lunchroom Supervisor and Maintenance Supervisor (Labor Relations Board Docket No. 88-5).

2. The bargaining unit represented by the Union has undergone some changes over the years. The recognition clause of the existing collective bargaining agreement between the Union and the Employer identifies the following positions as being included in the bargaining unit: all secretaries, custodians, program assistants, library assistants, individual assistants, and food service workers of the Employer. The Principal's Secretary/Supervisor of Secretaries, Lunchroom Supervisor, Maintenance Supervisor, all other supervisors, and all employees who work less than 20 hours per week or who work less than one hundred days per fiscal year are specifically excluded from the bargaining unit (Union Exhibit 6, Employer Exhibit 8).

3. The Employer offers a Career Exploration Program at Woodstock Union High School as part of the academic program. The program is derived from federal regulations designed to provide rehabilitation counseling services to special education students. The Career Exploration Program offers students the opportunity to experience a variety of work experiences, in the community and the school, based on their career interests. Students rotate through several different learning experiences each year. Students are required to maintain a journal of their experience, and develop other

materials such as resumes related to obtaining and maintaining successful employment (Employer Exhibits 3, 4 5).

4. The Career Exploration Program is coordinated and supervised through the High School's Learning Center. Jim Newberry, a paraeducator, was involved from approximately 1992 through 1996, along with Sheri Newberry, his supervisor and a teacher, in developing job sites for students, placing students in positions, working with students on job sites, and communicating with employers. During these years, there were not a large number of students involved in the program. Jim Newberry left his position in late 1996.

5. After Jim Newberry left the position, the Employer contracted with the Hartford Collaborative from 1997 through the completion of the 1997-98 school year to coordinate the development of job sites, placement of students, and monitoring of job sites. During this time, the number of job sites and student placements substantially increased.

6. For the 1998-99 school year, the Employer decided to have an employee of the School District provide the services formerly performed by the Hartford Collaborative. The Employer created a Job Placement Coordinator position. The Employer believed this would result in greater control and flexibility with respect to the duties performed by the Coordinator, and would be more cost-effective than the Hartford Collaborative as the Coordinator would work substantially more hours at only a slightly higher cost. The Employer also believed there would be more favorable responses from community employers by having a school employee, rather than a consultant, contacting employers.

7. Kathleen Callahan, the Employer's Director of Instructional Support Services, is responsible for the District's Special Education Services, including the Career Exploration Program. She was actively involved in recruiting for the Job Placement Coordinator position, which occurred in the Summer of 1998. Callahan also drafted a job description for the position that formed the basis for the duties of the position during the 1998-99 school year, although it was never approved by the School Board (Union Exhibit 1).

8. Mark Lather was hired as the Job Placement Coordinator for the 1998-99 school year. Lather was hired as a full-time employee, but worked as Job Placement Coordinator only two-thirds of the time. He was assigned as a paraeducator for the remaining one-third of his time. Lather was paid different wages for his paraeducator and Job Placement Coordinator duties. As a paraeducator, Lather is in the bargaining unit represented by the Union. The Union and Employer disagree as to whether the Job Placement Coordinator should be in the bargaining unit (Union Exhibit 5).

9. During the 1998-99 school year, Lather, as Job Placement Coordinator, worked closely with employers, and with teachers who were the special education case managers for students, to help create and sustain job opportunities for students with disabilities. He worked with students to help identify career interests and initiate career explorations. He provided skill training as needed, and assisted students in developing career portfolios. He contacted employers to develop job sites for the students and maintain partnerships with them. He worked with special education case managers to coordinate job placements with the students' Individualized Education Program ("IEP"). He monitored students' performance on job sites. He scheduled and coordinated the

transportation of students to and from job sites. He communicated with students' parents. He provided progress reports on students, and submitted reports to case managers (Union Exhibit 1).

10. The Job Placement Coordinator reports directly to the Learning Center Coordinator.

11. In performing Job Placement Coordinator duties during the 1998-99 school year, Lather spent the majority of time outside of the school. He also often had to meet with area employers outside of the hours of the regular school day.

12. The Job Placement Coordinator needs to be knowledgeable in child labor and occupational safety and health law and regulations. The Employer also prefers that the Job Placement Coordinator have a business background. Lather has experience in business and occupational safety and health issues through his previous employment as a risk manager at a ski resort (Employer Exhibit 4).

13. Before deciding where to place students in jobs, the Job Placement Coordinator attends IEP meetings and has discussions with parents, the student, the employer and the student's case manager (who is a teacher).

14. On June 9, 1999, two weeks before the hearing in this matter, the School Board approved a job description for the Job Placement Coordinator. The job description was similar to the draft job description developed the previous year by Callahan. An addition to the job description was to list qualifications for the position. Qualifications were described as: "Bachelor's Degree in Education, Psychology, or Social Work (or other related field deemed acceptable by the Board), private sector business experience, experience in the field of education and/or training in supported employment techniques".

Two additional job responsibilities also added to the job description were to “train and supervise individual assistants assigned to job sites” and “recommend IEP goals and objectives to the IEP team” (School Board Exhibit 2).

15. The Employer intends to make the Job Placement Coordinator position full-time during the 1999-2000 school year.

16. Special Education Instructional Assistants of the Employer work under the supervision of a special educator for planning and instructional issues. They assist in carrying out their assigned student(s)' IEP. They provide instruction to student(s) individually or in small groups by implementing daily lesson plans and activities as directed by the special educator and/or classroom teacher. They maintain records and files for assigned student(s) as directed by their supervising staff. Case managers provide direction to Instructional Assistants, but Assistants modify assignments at times as appropriate (Union Exhibit 2).

17. Instructional Assistants participate as a member of a cooperative team to assist in the development and implementation of programs for students with special needs. This includes attending team meetings and participating in training programs. They provide input to the special educator concerning student progress (Union Exhibit 2).

18. Instructional Assistants assist with the management of student behavior. Under the direction of a special educator and/or classroom teacher, they assist in carrying out a classroom behavior management plan and individual student behavior management plans. They maintain discipline by enforcing classroom rules (Union Exhibit 2).

19. Instructional Assistants provide input, through case managers or team meetings, on appropriate settings for their assigned students to work in the Career Exploration Program. Instructional Assistants work with students in the Career Exploration Program at their job sites. They may develop tasks for students, and provide support on the job site. They contact employers on matters such as scheduling changes, vacations and student illness. They also discuss with the employer how the student is performing on the job. They are involved in the evaluation of students' progress in the Career Exploration Program. They interact with the Job Placement Coordinator at students' work sites.

20. Instructional Assistants are required to have a high school diploma or the equivalent (Union Exhibit 2).

#### OPINION

By filing a unit clarification petition, the Union requests that we add the Job Placement Coordinator position to the existing bargaining unit represented by the Union without a representation election. The Employer opposes the petition on the grounds that the Coordinator is a professional employee and the Coordinator does not share a sufficient community of interests with employees in the existing bargaining unit. The Association maintains that the Job Placement Coordinator is not a professional employee and the Coordinator shares a complete community of interests with existing bargaining unit employees.

We first discuss whether the Job Placement Coordinator is a professional employee. A determination that the Coordinator is a professional employee essentially defeats the Union's unit clarification petition since a bargaining unit may not include

professional employees unless the professional employees vote to be included in the unit.

21 V.S.A. Section 1724(c)(1). "Professional" employee is defined in 21 V.S.A. Section 1502(11)<sup>1</sup> as follows:

- (A) Any employee engaged in work;
  - (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work,
  - (ii) involving the consistent exercise of discretion and judgment in its performance,
  - (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time,
  - (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or
- (B) Any employee who:
  - (i) has completed the courses of specialized intellectual instruction and study described in subdivision 11(A) of this section, and
  - (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in subdivision 11(a) of this section.

We look to *experience under the National Labor Relations Act* ("NLRA"), 29 U.S. Code Sections 141-187, for guidance in determining whether the Job Placement Coordinator is a professional employee within the meaning of this statutory definition. Resort to Federal precedent is a practice that has been approved by the Vermont Supreme Court in construing provisions under the Municipal Employee Relations Act ("MERA") which are similar to NLRA provisions. Firefighters Local 2628 and Brattleboro Fire

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<sup>1</sup> Although Section 1502(11) of Title 21 is part of the State Labor Relations Act, 21 V.S.A. Section 1501 *et seq.*, and the case before us is brought under the Municipal Employee Relations Act, the definition of



Department, 138 Vt. 347 (1980). In re Southwestern Vermont Education Association, 136 Vt. 490 (1978). Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451, 454-56 (1980). The definition of "professional" employee applicable under MERA is identical to that contained in Section 152(12) of the NLRA.

Under the NLRA, the National Labor Relations Board ("NLRB") requires that the specific criteria contained in the definition of "professional" employee must be met before the Board will find professional status. In Express News Corp. and San Antonio Typographical Union, #272, International Typographical Union, AFL-CIO, 223 NLRB 627, 628-29 (1976), the Board concluded that "journalists" (i.e., reporters, staff writers, columnists, copy editors, editors, editorial writers, and the cartoonist) were not professionals within the meaning of the Act because they did not need to have knowledge of an advanced type customarily acquired through a "prolonged course of specialized intellectual instruction and study in an institution of higher learning" but instead largely had a general academic education. The Board found that, although a majority of journalists had a college degree and most other journalists had taken college courses, they lacked specialized education in the field of journalism or communications. Id. at 628. The Board stated that the definition of "professional" employee "specifically distinguishes knowledge acquired from a general education from that required for professional work", and concluded that "the general college education . . . does not satisfy the standard" of the "professional" employee definition. Id. at 629.

Similarly, in Binghamton Press Company, Inc. and Binghamton Typographical Union, No. 232, International Typographical Union, AFL-CIO, 226 NLRB 808 (1976),

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professional employee contained in Section 1502(11) is incorporated into the Municipal Act by Section 1722(12) of the Municipal Act.

the NLRB concluded that reporters, columnists, editorial writers, copy editors and photographers were not professional employees within the meaning of the NLRA. The Board reiterated the views expressed in Express News that “journalism primarily is a field of generalists with general academic backgrounds” and that “journalists are not required to have knowledge of an advanced type customarily acquired through specialized training in an institution of higher learning”. *Id.* at 809-10.

We find this precedent under the NLRB persuasive. We too conclude that knowledge acquired from a general college education does not meet the requirement of “professional” status under the Municipal Act that an employee needs “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital”. In applying that standard to this case, we conclude that the Job Placement Coordinator does not meet the definition of “professional” employee.

The Employer presented no evidence on the actual educational background of the current Job Placement Coordinator. The Employer relies on a job description approved by the School Board two weeks before the hearing in this matter which requires for educational qualifications a “Bachelor’s Degree in Education, Psychology, or Social Work (or other related field deemed acceptable by the Board)”. Assuming that the Job Placement Coordinator position actually requires this educational background, such an educational background reflects a general college education as distinguished from specialized intellectual instruction and study in a field necessary to performing the job placement work done by the Coordinator.

In reaching our conclusion, we are not denigrating the work of the Coordinator. We do not question the challenging, varied and independent nature of the work the Coordinator performs. We recognize that the Coordinator must bring a variety of skills to the job, use initiative in completing the variety of tasks required, and exercise independent judgment in how best to coordinate job placement for students. However, the critical issue is whether the Coordinator position meets the specific educational requirement set forth in the statutory "professional" employee definition. We believe such requirement is not met.

Although we conclude that the Coordinator is not a professional employee within the meaning of the Municipal Act, this does not necessarily mean it is appropriate to add the Coordinator to the bargaining unit by way of a unit clarification petition. The Union is seeking to add the position to the bargaining unit by the method of accretion rather than by election.

*Accretion is the process whereby new employees, whose work and interests are aligned with those of employees in an existing bargaining unit, are added to that unit. Barre Town School Chapter, AFSCME Local 1369 and Barre Town School District, 13 VLRB 364, 368 (1990). If the duties of the new employees are identical or substantially similar to those of employees in an existing bargaining unit, it is appropriate to find an accretion. Id. A determination will be made whether the new employee shares a sufficient community of interests with employees in the existing unit. Id. at 369. In accretion cases, the Board must consider the facts in light of conflicting policies of maintaining stability in labor relations and assuring that employees have the right to choose their bargaining representative. Id. In the only previous accretion case decided by the Board, the Board*

declined to add an inventory clerk to an existing bargaining unit by accretion where approximately 75 percent of the duties performed by the clerk either were not engaged in previously or were performed by non-bargaining employees, and the interests of the clerk *were more closely aligned with employees not in the bargaining unit than with bargaining unit employees.* Id.

It is a difficult question whether the Job Placement Coordinator should be added to the existing bargaining unit through a unit clarification petition without providing the Coordinator with the opportunity to vote on the question of being represented by the Union. On the one hand, the work performed by the Coordinator has similarities to that previously performed by a paraeducator in the bargaining unit from approximately 1992 to 1996. The paraeducator then, along with his supervising teacher, was involved in developing job sites for students, placing students in positions, working with students on job sites, and communicating with employers. The Job Placement Coordinator also is performing these duties.

On the other hand, when the paraeducator left his position in 1996, a consultant assumed the job placement work through the end of the 1997-98 school year during a period when the number of job sites and student placements substantially increased. When the Job Placement Coordinator replaced the consultant and began employment at the beginning of the 1998-99 school year, he assumed increased duties which exceeded those the paraeducator had earlier performed.

Also, the determination whether the Job Placement Coordinator shares a sufficient community of interests with existing bargaining unit employees is not easily ascertained. At the hearing, the Union presented evidence in an attempt to demonstrate a strong

community of interests with the Instructional Assistants. There are some shared interests. The Coordinator and the Instructional Assistants are both involved in working with students, employers, parents and educators in the student job placement program and with respect to individual students' Individualized Education Programs ("IEP"). In performing such duties, they interact with each other. They also spend a significant amount of time outside the school at job sites.

However, there also are significant differences. The level of responsibility, and degree of discretion and independent judgment, exercised by the Coordinator substantially exceeds that of the Instructional Assistants. Also, unlike the Instructional Assistants, the Coordinator is required to perform a significant amount of work outside of school hours. The employees also are supervised differently. Special educators directly supervise instructional assistants, while the Job Placement Coordinator reports to the Learning Center Coordinator. We note in this regard that, although the Employer contends that the Job Placement Coordinator performs some supervisory responsibilities over Instructional Assistants, specific evidence was not presented to support this claim.

In sum, we are left with a difficult question. Ultimately, we conclude that the similarity between the work performed by the Job Placement Coordinator and the job placement work previously performed by the paraeducator, and the community of interests between the Coordinator and bargaining unit employees, suffice to grant the Union's petition to add the Coordinator to the bargaining unit without an election. Although the Coordinator has assumed increased, more responsible duties than previously were performed by a bargaining unit employee, we do not view the evolution in duties to be so fundamental as to conclude an accretion has not occurred. Boston Gas

Co. and Utility Workers, Local 446-G, Steelworkers, 235 NLRB. No. 187 (1978). Also, unlike the situation in the Barre Town case, the Coordinator does not have a greater community of interests with non-bargaining unit employees than with bargaining unit employees. In fact, there is no evidence of any employees eligible to be represented by a union who are not already in a union-represented bargaining unit other than the Coordinator. Given these circumstances, adding the Coordinator to the bargaining unit enhances the stability of labor relations, a factor in this case which outweighs the right of employees to determine whether they wish to be represented by a union.

**ORDER**

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unit clarification petition filed by the Woodstock Union High School Teachers Organization, Educational Support Personnel Unit ("Union") is GRANTED, and the Job Placement Coordinator employed by the Woodstock Union High School District is added to the support staff bargaining unit represented by the Union.

Dated this 14<sup>th</sup> day of September, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Catherine L. Frank, Chairperson

  
Carroll P. Comstock

  
Edward R. Zuccaro