In the matter of Derby Board of Education -and-
Derby Administrators Association
Case No. TPP-16,021
Decision No. 3450

was appealed to Hartford Superior Court
on September 13, 1996
Docket No. CV97-566777

Appealed dismissed 10/1/97

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
DERBY BOARD OF EDUCATION

DECISION NO. 3450

-and-

DERBY ADMINISTRATORS ASSOCIATION

NOVEMBER 6, 1996

CASE NO. TPP-16,021

APPEARANCES:

Attorney Loren Lettick
For the Board of Education

Attorney William S. Zeman
For the Union

DECISION AND DISMISSAL OF COMPLAINT

On December 6, 1993, the Derby Administrators' Association (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board), alleging that the Derby Board of Education (the School Board) had committed and was committing prohibited practices in violation of the School Board Teachers Negotiation Act, Conn. Gen. Stat. Sections 10-153e(b)(1)(2), and (4) (the Act or TNA). Specifically, the Union alleged that the Board was violating the Act by refusing to bargain concerning the elimination of the position of Director of Instruction and the reassignment of the duties for that position.

On December 20, 1994, the Union filed an amended complaint alleging the same violation, but withdrawing that part of the complaint concerning the reassignment of certain of the duties in question to other members of the bargaining unit. The Union's remaining amended complaint was directed at the Superintendent and subcontractors.

After the requisite preliminary steps had been taken, the case came before the Labor Board for ten days of hearing on the following dates: January 19, 1995, January 20, 1995, May 1, 1995, May 5, 1995, May 22, 1995, May 26, 1995, August 4, 1995, September 8, 1995,

September 12, 1995 and November 29, 1995. Both parties appeared, were represented by counsel, and were given the opportunity to present evidence, examine and cross-examine witnesses and make argument. Both parties filed briefs and reply briefs, the last of which was received by the Labor Board on February 22, 1996. Based on the entire record before us, we make the following findings of fact and conclusions of law, and we dismiss the complaint.

FINDINGS OF FACT

1. The School Board is an employer within the meaning of the Act.

2. The Union is an employee organization within the meaning of the Act and was, at all times material to the complaint, the exclusive bargaining representative for all certified administrators employed by the Board.

3. The School Board and the Union were parties to successor collective bargaining agreements with effective dates of July 1, 1987 through June 30, 1993 and July 1, 1993 through June 30, 1996.

4. On January 12, 1989, the Connecticut State Department of Education issued a report in response to a complaint filed against the School Board pursuant to Conn. Gen. Stat. Section 10-4b. That report dealt with certain deficiencies in the Derby schools, including the need for a full-time coordinator of curriculum.

5. On or around July 1,1989, Dr. Nathan Chesler assumed the position of Superintendent of Schools for the School Board.

6. In response to the findings and recommendations of the Connecticut State Department of Education, Chesler recommended that the School Board fill a position for a full-time coordinator of curriculum. The Board adopted this recommendation and authorized the hiring for the position of Director of Instruction.

7. Chesler drafted and posted the Notice of Administrative Vacancy and job description for the Director of Instruction.

8. Lois Caprio was hired as Director of Instruction and assumed that position on or around October 16, 1989.

'9. The position of Director of Instruction was included in the bargaining unit.

10. While Caprio occupied the position of Director of Instruction, she had five major areas of responsibility, as set forth in the job description, which took the following approximate percentages of her time:

Area of Responsibility	Approximate % of Time Spent
Supervise Student-Teacher Training Program	5%
Coordinate Curriculum Development & Revise/Mod@ Curriculum When Necessary	25%
Coordinate Staff Development with Superintendent	30%
Complete Grant Proposals	15-30%
Supervise and Coordinate System-Wide Testing Program	10%

11. As the Supervisor of the Student Teacher Program, Caprio matched Student Teachers and Cooperating Teachers in the district and oversaw the students' placements.

12. In her work on the curriculum, Caprio evaluated the subject matter and the current curriculum, and supervised and coordinated the evaluation and revisions of curriculum made by "curriculum committees" which modified the curriculum. The committees included staff within and outside of the bargaining unit. She also coordinated the implementation of curriculum across school levels. The Superintendent also performed some of the curriculum coordination.

13. By the time Caprio left the position in June, 1993, nearly all the revisions to curriculum necessary to respond to the Section 10-4b report had been made. The remaining areas left to be done in curriculum coordination and development were the ongoing coordination and supervision of curriculum and the periodic review of curriculum.

14. In the area of staff development, Caprio worked with a staff development committee consisting of employees from within and outside the bargaining unit, including Chesler, in developing a staff development plan and plans for staff training programs. She contacted outside contractors to present material, and planned and scheduled staff development programs.

15. Chesler, who had a background in the area of staff development, trained Caprio in that area. He also had ongoing responsibility in the area of staff development. He contacted, interviewed and selected presenters, scheduled sessions, prepared materials, and coordinated the programs with Caprio. Chesler also determined whether continuing education credits should be approved for the programs.

16. Caprio had exclusive responsibility for completing certain grant proposals such as "Chapter 2" grant proposals and certain one-time grants.

17. Prior to and during Caprio's tenure as Director of Instruction, other grant proposals were prepared by other members of the bargaining unit, as well as individuals outside the bargaining unit including Chesler, one teacher and an outside contractor, including the large "Chapter 1" grant proposals. Caprio had little or no involvement in these other grant proposals.

18. On June 17, 1993, the School Board voted to eliminate the position of Director of

Instruction effective July 1, 1993, solely for economic reasons.

19. The position of Director of Instruction was eliminated July 1, 1993 and has not been reinstated.

20. After the position of Director of Instruction was eliminated, some of the duties that Caprio had performed were performed by other bargaining unit members and persons outside the bargaining unit. Specifically, the overall responsibility for staff development was fulfilled by the Superintendent and outside contractors. The duties of completing grant proposals and monitoring grants were fulfilled by the Superintendent, outside consultants, other members of the bargaining unit and teachers. The duties for curriculum supervision and coordination were fulfilled by the Superintendent and school principals, the latter of which are members of the bargaining unit. The duties for the student teacher program and the districtwide testing were assumed by members of the bargaining unit.

CONCLUSIONS OF LAW

1. Prior to the Labor Board's decision in ***City of New Britain***, Decision No. 3290 (April 6, 1995), in the absence of an adequate defense, an employer committed an illegal refusal to bargain and a prohibited practice under the Act when it unilaterally transferred to non-bargaining unit personnel work that had been performed exclusively by bargaining unit employees in the past.

2. Absent exceptional circumstances, the standard enunciated in ***City of New Britain***, Decision No. 3290 (1995) will not be applied retroactively to cases in which the action complained of occurred prior to April 6, 1995.

3. The School Board did not commit a violation of the Act and a prohibited practice when it unilaterally eliminated the position of Director of Instruction and assigned some of her duties to nonbargaining unit members because the duties of the Director of Instruction overlapped and were shared substantially during her tenure with persons outside the bargaining unit, including the Superintendent and subcontractors.

DISCUSSION

The parties do not dispute that the position of Director of Instruction was eliminated on or around July 1, 1993 and the work from that position was transferred, in part, outside the bargaining unit. Therefore, the first issue before us is what constitutes the proper standard for reviewing the defense offered by the School Board. The Union argues that we should apply the standard from our decision in ***City of New Britain,*** Decision No. 3290 (April 6, 1995), which was issued during the pendency of the hearings in this matter. The School Board asserts that we should apply our "exclusively/shared work" rule or doctrine, which existed prior to our ruling ***New Britain,*** at the time of the reassignment of the job duties in question and during the pendency of this proceeding.

We agree with the School Board that the ***New Britain*** standard should not be applied retroactively in this case. In our decision in ***Naugatuck Board of Education***, Decision No. 3340 (1995), we stated that "...absent exceptional circumstances, we will not retroactively apply the ***New Britain*** standard to cases in which the actions complained of pre-date April 6, 1995." ***Naugatuck Board of Education*** at 5. There have been no facts presented in the instant case to justify retroactive application. Therefore, the "shared work" doctrine will be applied in this case.

The second issue is whether the undisputed transfer of work outside of the bargaining unit is justified by the "shared work" doctrine. The Union claims that the defense fails primarily because the main three areas of work for the Director of Instruction were not shared with others outside the bargaining unit before the position was eliminated and therefore, could not be transferred legitimately outside the unit without bargaining. The School Board argues that the Director substantially shared her duties with non-bargaining members throughout her tenure and therefore the continuation of "sharing" is not a violation of the Act.

The "shared work' doctrine provides a defense to the general rule that an employer commits an illegal refusal to bargain and a prohibited practice under the Act when it unilaterally assigns to nonbargaining unit personnel work that had been performed exclusively by bargaining unit members. ***Naugatuck Board of Education, supra*** [citations omitted]. When an employer demonstrates that the work transferred had by practice been shared between members of the bargaining unit and persons outside the unit, the continued assignment of work to non-unit individuals does not violate the Act. Id.

We conclude that here, the School Board's actions were defensible under the "shared work" doctrine. The Director's work, both by definition and by practice, was shared during the Director's tenure. Once the position was eliminated, some of the work continued to be performed by others outside the bargaining unit.

First, the job description for the Director's position reflects that the position was overall one in which there was significant overlap of duties with personnel and with contractors outside the bargaining unit. In two of the three areas that the parties agreed comprised the majority of the job, the Director was required to "coordinate Staff Development with the Superintendent" and "coordinate Curriculum Development." Thus, by definition, the Director's job was one that entailed coordinating work on an ongoing basis with the Superintendent and other School Board staff members.

Moreover, the record is replete with evidence that in practice, as well as on paper, the Director spent an overwhelming majority of her time and effort sharing job responsibilities with others outside the bargaining unit. This was the case when we review the job overall, but also when we break the job down into its major components. In the area of staff development, the Director and the Superintendent both contacted and interviewed workshop leaders and administered the staff development workshops. The Director and the Superintendent conferred

about the content and conduct of the workshops. In addition, the Director and Superintendent coordinated the staff development area with a committee of other staff members.

The same was true in the area of curriculum development, revision and modification. The Director coordinated the effort of the curriculum committees, who developed and revised the curriculum. She also assisted in implementing the curricula across grade levels. However, she did this consistently in conjunction with staff members, including the Superintendent and teachers. The only task that she seems to have done alone was formatting the revised curricula. This is an insufficient basis for a conclusion that she did not share the work in this area, especially when the real "meat" of the work in this area was clearly shared.

Finally, in the area of completing grant proposals, it was undisputed that others outside the bargaining unit also completed grant proposals at the time the Director was performing this work. A teacher and an outside contractor were routinely responsible for the large "Chapter I" grants, and Chesler helped prepare certain grant proposals from time to time.

The Union argues that we should essentially micro-divide the Director's job and consider that since the Director was solely responsible for a particular grant, the transfer of all grant work is prohibited. As in the past, we decline to analyze job duties in such an artificial, impractical light.

Therefore, we conclude that the job of Director of Instruction was both intended to be and was essentially a job in which many duties overlapped and were shared by the Director with others outside the bargaining unit. The School Board did not violate the Act by transferring some of the Director's work outside the bargaining unit after the elimination of her position.

The Union has raised several other arguments to which we must now respond. The Union argues at page 11 of its brief that the School Board's "shared work' defense should fail here because our decision in ***Naugatuck Board of Education, supra,*** held that the shared work doctrine does not apply to the relationship between a supervisor and supervisee. This is incorrect. In that case, the employer argued that a supervisor's temporary and sporadic assistance to a member of a bargaining unit laid an adequate foundation for the shared work defense. We concluded that the supervisor "covered for" an employee "in a pinch," which was an insufficient sharing of duties to legitimize a subsequent wholesale transfer of the work outside of the bargaining unit. ***Naugatuck Board of Educntion,*** 6. In the instant case, the overwhelming majority of the Director's work overlapped the work routinely done by others outside the bargaining unit, especially the Superintendent. That overlap and sharing do constitute an adequate justification for the subsequent transfer of work.

The Union also asserts that the shared work rule has never been applied by the Labor Board to include persons exempt from Conn. Gen, Stat. §10-153b(b). The statutory provision exempts the Superintendent, among others, from that section and from administrators' bargaining units. Again, we believe the Union's reasoning is incorrect on this point. It is true that the statute

excludes a Superintendent of Schools and certain others from the bargaining unit. However, these are precisely the type of personnel to which the "shared work" doctrine generally applies. In other words, the "shared work" doctrine applies to the transfer of work to persons who are not part of the bargaining unit. The thrust of Section 10-153b(b) is merely to define who is statutorily excluded from administrators' bargaining unit. In the instant case, the Superintendent is excluded from the administrator's bargaining unit. This does not preclude him from being included in a "shared work" analysis.

The Union's argument is likewise incorrect about the application of Conn. Gen. Stat. §10-157 to the Superintendent's performance of duties once performed by the Director of Instruction. That Section provides, in part, that a Superintendent "... shall serve as the Chief Executive Officer of the Board [of Education]... Employment of a Superintendent shall be by election of the Board of Education.. ." The Union argues that because this section makes a Superintendent a Chief Executive Officer and an elected public officer, a Superintendent cannot be covered by the shared work rule. We disagree.

First, we agree with the School Board's argument that Section 1 O-1 57 does not render a Superintendent, including the Superintendent here, an elected public officer as that term is generally understood. That term generally connotes an election by the public at large. Under Section 10-157, a Superintendent is required to be elected by a School Board, just as Chief Executive Officers are generally required to be elected by Boards of Directors and Boards of Trustees. Even if a Superintendent were to be made an elected public officer by Section 1 O-l 57, it is unclear to us why that fact would necessarily render the "shared work rule" inapplicable, but we need not reach this point.

The Union also argues that there is insufficient evidence for a finding of fact about the School Board's practice prior to the hiring of the Director of Instruction because the Superintendent's testimony was hearsay and any past practice was against public policy as articulated by the State Board of Education. First, the Superintendent's testimony was based on the official business records of the School Board, and would appear to be covered by the business records exception to the hearsay rule. In addition, the Superintendent had persona1 experience between his hiring in July, 1989 and the Director's hiring in October, 1989. However, the issue is moot because we do not rely on that evidence in any event to make our findings, conclusions or order. We have focused on the circumstances as they existed between the creation of the position and its elimination.

The Union argues at page 14 of its Brief that the School Board is essentially asserting an absolute managerial right to eliminate the Director's position on paper while continuing to have the work performed outside the unit. Again, the School Board has demonstrated that the Director's work was shared with people outside the bargaining unit throughout her tenure. Therefore, their continued performance of that work was justified after the Director's position was eliminated.

Finally, the "shared work" rule dictates our decision here and the public policy arguments offered do not support deviating from that decision.

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the School Board Teachers Negotiation Act, it is hereby

ORDERED that the complaint filed herein be, and the same hereby is, **DISMISSED.**

CONNECTICUT STATE BOARD OF LABOR RELATIONS

s/Anthony Sbona
Anthony Sbona
Acting Chairman

s/Susan Carlson
Susan Carlson
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 6th day of November, 1996 to the following:

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