State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

LINCOLN-WOODSTOCK COOPERATIVE SCHOOL DISTRICT Complainant v. LIN-WOOD EDUCATION ASSOCIATION/ NEA-NEW HAMPSHIRE Respondent	:	CASE NO. T-0204:17 DECISION NO. 96-01

APPEARANCES

Representing Lincoln Woodstock Cooperative School District:

Bradley F. Kidder, Esq., Counsel

Representing Lin-Wood Education Association/NEA-NH:

James Allmendinger, Esq., Counsel

Also appearing:

Brian Sullivan, NEA-New Hampshire
David R. Stolper, Lin-Wood
Christie A. Nutter, Lin-Wood
G. Michael Weaver, Lin-Wood
Ed LaFleur, Superintendent Lin-Wood
Michael A. Morgan, Principal Lin-Wood

BACKGROUND

The Lincoln-Woodstock Cooperative School District (District) by and through its Board, filed unfair labor practice (ULP) charges against the Lin-Wood Education Association, NEA-New Hampshire (Association) on August 14, 1995 alleging violations of RSA 273-A:5 II (f) resulting from the Association's attempting to grieve a non-grievable subject not covered by the collective

bargaining agreement (CBA). The Association filed its answer on August 28, 1995. After a continuance sought by and granted to the District, this matter was heard by the PELRB on October 24, 1995.

FINDINGS OF FACT

1. The Lincoln Woodstock Cooperative School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.

2. The Lin-Wood Education Association is the duly certified bargaining agent for teachers employed by the District.

3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period July 1, 1993 until August 31, 1995. The definition of a "grievance" under Article 4.1 of the CBA is "a complaint by a teacher that there has been a violation or misapplication of the provisions of this agreement." Article 4.2 continues by setting forth four areas excluded from the grievance procedure. None excludes evaluations of non-probationary teachers. Article XIII of the CBA is entitled "Fair Treatment" and provides:

> Any teacher who may be discharged, disciplined or reprimanded shall have (on written request to the Superintendent) copies of all information on file that supports the charges made against that teacher. All reprimands, suspensions, discharges, or disciplinary action shall be for just cause and shall comply with State laws, State Board of Education rules, and School Board rules and policies.

Article XIX, Section 2 of the CBA provides, "The Board agrees not to discriminate against a teacher because of race, color, creed, age, sex, marital status, national origin, handicap, or membership in the Association."

4. David Stolper is an eleven (11) year employee of the District where he taught math and science during the 1994-95 school year.

5. On March 23, 1995, Principal Michael Morgan completed a four page "Summary Evaluation Form" on Stolper. That

form involves seven categories (Professional Responsibilities, Professional Attributes, Instruction, Classroom Management, Classroom Environment, Record Keeping and Professional Growth) and 58 separately rated items. Stolper was rated 1 (commendable), 2 (professional competence) or "1-2" in 57 of those items. He was rated "2-3" relative to demonstrating a positive approach to problem solving with administration, colleagues and parents. Concurrently, Stolper was "recommended with reservations" by Morgan to the Superintendent for renomination. Stolper provided a written response to the evaluation on April 6, 1995. District Exhibit Nos. 1 and 2.

6. On April 18, 1995, Stolper was notified of his renomination by then Superintendent Douglas McDonald. McDonald warned, "...if you do not improve in this area [interpersonal relations] to an acceptable standard, you will not be renominated beyond next year."

7. By April 26, 1995, Stolper had raised his concerns to the level of a written grievance, transmitted by UniServ Director Brian Sullivan to Morgan. The grievance cited three issues: (1) his 1994-95 evaluation and recommendation with reservations was without just cause and based on biased, inaccurate and inappropriate information, (2) a letter of reprimand dated March 29, 1995 was without just cause, and (3) Morgan continues to display an inability to deal with Stolper. Contract articles alleged to have been violated included XIII, "Fair Treatment" and XIX, "Non-Discrimination." District Ex. No. 5. In the interim, Morgan notified Sullivan that the letter of reprimand grievance was being sustained and that the letter would be removed from Stolper's file. All other aspects of the pre-written grievance were being sustained. This occurred on April 21, 1995. District Ex. No. 4.

8. On May 5, 1995, Morgan sent a memo to Sullivan denying all remaining issues of the Level 2 (written) grievance. District Ex. No. 6. Specifically, Morgan said the summary evaluation was not grievable, his recommendation to the Superintendent was not grievable and the CBA had not been violated. Sullivan then appealed the remaining issues to the Superintendent by letter of May 17, 1995. District Ex. No. 7. McDonald replied to Sullivan on May 24, 1995 saying (1) that a summary evaluation is not grievable, (2) that Morgan

treated Stolper in a fair and professional manner, (3) that his (McDonald's) letter of April 18, 1995 did not violate the CBA and (4) that the grievance was denied. District Ex. No. 8

9. On May 26, 1995, Sullivan wrote Daniel Barry, Chair of the School Board, to appeal McDonald's step 3 denial of Stolper's grievance. District Ex. No. 9. By letter dated June 14, 1995, with a handwritten inscription "should be 6/21/95," from Attorney Bradley Kidder, Sullivan was advised that the Lincoln-Woodstock Cooperative School Board had denied the grievance. District Ex. No. 10.

10. By letter of July 7, Sullivan informed Kidder of the Association's intent to submit the pending grievance to arbitration under Article IV of the CBA. District Ex. No. 11.

DECISION AND ORDER

The District would have the PELRB stop the processing of the pending grievance through the arbitration step of the contract because "the Lin-Wood CBA is not susceptible of a reading which covers the dispute regarding Principal Morgan's Summary Evaluation and/or Principal Morgan's recommendation re the renewal of the grievant." School Board Request for Findings of Fact and Rulings of Law, No. 17. We disagree.

The two leading cases on arbitrability are Appeal of Westmoreland School Board, 132 N.H. 103 (1989) and Appeal of City of Nashua School Board, 132 N.H. 699 (1990). In Westmoreland, the New Hampshire Supreme Court (Court), citing to Steelworkers v. Warrior and Gulf Co., 363 U.S. 574 (1960), discussed the "positive assurance" test. " Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists and 'in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

In the case at hand, the parties have taken careful and specific steps to exclude four areas from the grievance procedure. They are: (1) any matter for which a specific method or review is prescribed and expressly set forth by law or by any rule or regulation of the State Commissioner of Education, (2) a complaint by a probationary teacher..., (3) a complaint by any certified personnel caused by appointment or lack of appointment,

retention or lack of retention in any position for which a contract is not required, and (4) any matter, which, according to law, is beyond the scope of the Board's authority or limited to unilateral action by the Board alone." None of these exclusions precludes raising the issue of an allegedly defective evaluation from being processed through the grievance procedure. In fact, given that the present complaint alleges that the evaluation was based on "biased, inaccurate and inappropriate information," it appears that the accuracy of those charges, if not resolved by the School Board, should be resolved with finality by the arbitration process contemplated by Article IV of the contract.

In Nashua, *supra*, the Court said it would not set aside a PELRB order to arbitrate "unless we find by a clear preponderance of the evidence that it is erroneous as a matter of law, unjust or unreasonable." "We will not reverse an order to arbitrate unless we can say with positive assurance that the CBA's arbitration clause is not susceptible of a reading that will cover the dispute." (Emphasis added.) 132 N.H. 699 at 701 (1990). The District's case failed to meet the quantum of proof required to convince us with "positive assurance" that this matter was excluded from the grievance process. While the District argued, in Request for Findings, No. 17, that the CBA was "not susceptible of a reading which covers the dispute," we were presented with none of the traditional proofs, such as specific disclaimers or bargaining history, which would be persuasive of this argument. The burden in a "positive assurance" case rests with the party raising it as a bar. The District failed in its attempt to carry this burden or to present the "forceful evidence" required.

The ULP is hereby DISMISSED and the parties are directed to proceed with arbitration of the pending grievance as originally scheduled.

So ordered.
Signed this 15th day of January, 1996.

EDWARD J. HASELTINE
Chairman

By majority vote, members Molan and Roulx voting in the majority and Chairman Haseltine voting in the minority.