



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PEMI-BAKER REGIONAL SCHOOL DISTRICT	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. M-0628:1
	:	
PLYMOUTH REGIONAL SUPPORT STAFF/NEA-NEW HAMPSHIRE	:	DECISION NO. 96-017
	:	
Respondent	:	
	:	

APPEARANCES

Representing Pemi-Baker School District:

Matthew H. Upton, Esq.

Representing Plymouth Regional School Support Staff:

James Allmendinger, Esq.

Also appearing:

Robert Azevedo, Jr., Plymouth Regional High School
Terrence Forbes, Plymouth Regional High School
Maria Dreyer, Plymouth Regional High School
Bruce W. Parsons, Plymouth Regional High School
Randy Cleary, NEA-New Hampshire
Christopher T. Wood, Plymouth Regional High School
W. Cusmo, Visitor
John True, Jr., Superintendent of Schools

BACKGROUND

Pemi-Baker Regional School District (District) filed unfair labor practice (ULP) charges against the Plymouth Regional Educational Support Staff Association, NEA/NH (Association) on December 2, 1995 alleging violations of RSA 273-A:5 II (b), (d) and (f) relating to a wrongful demand to arbitrate, namely, for an employee who was not a member of the bargaining unit. The

Association filed its answer on December 15, 1995. This matter was heard by the PELRB on January 23, 1996.

FINDINGS OF FACT

1. The Pemi-Baker Regional School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.
2. The Plymouth Regional Educational Support Staff Association, NEA/NH is the duly certified bargaining agent for aides, clerical secretaries, custodians, security guards, crossing guards and teaching assistants employed by the District. [The PELRB notes that the parties have negotiated subtle changes to the job classifications covered by the collective bargaining agreement (CBA) as reflected at Article XVII thereof. Those changes have not been placed on file with the PELRB; therefore, the job titles reflected above are from the most recent certification documents on file with the PELRB.]
3. The District and the Association are parties to a CBA for the period July 1, 1995 to June 30, 1998. Article 4.2 of the CBA provides that new employees in the bargaining unit serve a probationary period of sixty (60) days. Article 3.1 of the CBA defines "grievance" as "an alleged violation of the express terms and conditions of this Agreement." Article 3.1 defines a grievant "as the employee or employees alleging the grievance." Article 3.4 permits "any employee who has a grievance" to submit it in writing and to engage in informal efforts at settlement with his/her immediate supervisor. The grievance procedure consists of five steps, the last of which is binding arbitration, as set forth in Article 3.11.
4. The grievance which the District is claiming is a wrongful demand to arbitrate was filed by and/or on behalf of Robert Azevedo on October 10, 1995 and claims that the Superintendent, John True, discharged Azevedo "from his position as aide in the Plymouth Regional High School." (District Exhibit No. 10.) It claims this action violated Article 4.1, 4.2, 4.3, 4.4 and 4.5 of the CBA. The District claims that Azevedo was not an

"employee" of the District and, therefore, has no standing to file or pursue this grievance.

5. Azevedo received his bachelor's degree from Plymouth State College in 1994. He had worked intermittently as a substitute for the District until March of 1995 when he was hired as a "mainstream aide" for 57 days between March 22, 1995 and June 16, 1995. His 1995 employment contract with the District expired on June 16, 1995. (District Exhibit No. 2.) This position was funded by a special education grant which expired at the end of the 1994-95 school year. Accordingly, when it expired, Azevedo was not automatically offered a continuing position for the 1995-96 school year, notwithstanding the fact that his supervisors gave him good recommendations for his job performance in the spring of 1995.
6. In July and August of 1995, Azevedo made repeated inquiries of Bruce Parsons, the high school principal, about full-time employment possibilities for SY 1995-96. During these two months, Parsons learned that a vocational aide position would be available for SY 1995-96 if funding was approved in the form of a Perkins Grant. Parsons learned of this funding approval from Maria Dreyer, the Special Education Director. Dreyer then interviewed and recommended Azevedo for the vocational aide position. During conversations with Azevedo, both Parsons and Dreyer told him of a vacancy in another district for a special education aide at \$8.31 per hour. Azevedo applied for and was offered this position but turned it down because first, he wanted to stay at Plymouth, second, the Plymouth position paid \$2.10 more per hour. (District Ex. No. 3; Assn. Ex. No. 5), and, third, he had strong assurances he would get the Plymouth vocational aide vacancy. In this regard, Parsons testified that he told Azevedo that he could start SY 1995-96 as a substitute until his hiring as a vocational aide was formally approved by the school board, a practice which Parsons and the Superintendent said was not unusual in cases such as his. Likewise, Parsons had told mainstream aide Christopher Wood and Association president Terrence Forbes that Azevedo was getting the job vacancy.
7. Azevedo began SY 1995-96 in the employ of the

District as a substitute, as established by pay documents showing he was paid a \$50 per diem for 27 days in August and September of 1995. (Assn. Ex. Nos. 6, 7 and 8.) He testified that he was told his pay would be increased from \$50 per day to \$10.41 per hour when the school board approved his being hired to fill the vocational aide vacancy.

8. On or about September 5, 1995, Azevedo received and signed an individual employment agreement for SY 1995-96 from the District. That agreement had not then been signed by a representative of the District or its school board. (District Ex. No. 3) On or about September 13, 1995, Azevedo was nominated to fill the vocational aide vacancy. (Assn. Ex. No. 13.) That nomination was never presented to and/or acted upon by the school board whereupon Azevedo was released from his employment as a substitute teacher at the end of September, 1995.
9. Azevedo and the Association have argued that he was treated as a "regular employee" of the District and, as such, should have access to the grievance procedure of the CBA. In support of this proposition, Azevedo testified he was given keys, a school mailbox, health, life and dental insurance, morning, lunch and after-school duties, and the responsibility to drive a school vehicle--none of which would have been the case had he not been a "regular employee." His counsel argued that he could not have been given these additional benefits under RSA 194:3 IV unless he were a "regular employee."
10. The District argued that Azevedo was never a "regular employee," within the meaning of the CBA and its recognition clause, during the 1995-96 school year; therefore, he should not be able to avail himself of the grievance procedure for acts complained of during that school year.

DECISION AND ORDER

In order for a complaining employee to have access to the grievance procedure under the CBA, he or she must be a member of the bargaining unit of employees represented by the certified bargaining agent for that bargaining unit. In this case, both the mainstream aide and the vocational aide positions are considered to be in the bargaining unit. A "substitute," however, would not be in the bargaining unit because employees

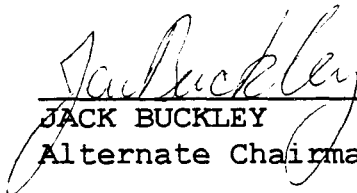
who are on "temporary status, employed seasonally, irregularly or on call" are excluded from coverage as "public employees" by RSA 273-A:1 IX.

Whether as the result of mistaken anticipation or inadvertence, Azevedo had many of the attributes of a "regular employee," i.e., he had keys, a mailbox, various types of insurance only offered to "regular employees," and performed additional duties not normally assigned to substitute personnel. What he did not have, however, was a signed contract making him a member of the bargaining unit for SY 1995-96. (District Exhibit No. 3) At the time of his complaint or grievance, he was being compensated as a substitute. (Association Exhibit Nos. 6, 7 and 8.) While any independent trier of fact would have to acknowledge that Azevedo, individually, as well as his colleagues at the high school, had been led to believe that he would be hired for the SY 1995-96 vocational aide vacancy, while this was printed in the local newspaper (Association Exhibit No. 9), and while he relied on this expectation when he declined another job offer (Association Exhibit No. 5), he never achieved "employee" status in SY 1995-96 to come within the ambit of personnel covered by the CBA. Likewise, he severed his status as an employee at the end of SY 1994-95 when his contract for the last portion of that academic year expired. (Employer Exhibit No. 2)

For these reasons, the Association may not process the instant grievance to arbitration; to insist on doing so is violative of RSA 273-A:5 II (f). The Association is directed to CEASE and DESIST from further processing of this case as a matter for arbitration.

So ordered.

Signed this 13th day of March, 1996.


 JACK BUCKLEY
 Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley presiding. Members William Kidder and E. Vincent Hall present and voting.